84-1341

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DUQUESNE LIGHT COMPANY, OHIO POWER COMPANY, WEST PENN POWER COMPANY, APPALACHIAN POWER COMPANY, MONONGAHELA POWER COMPANY, THE POTOMAC EDISON COMPANY, and VIRGINIA ELECTRIC AND POWER COMPANY,

Petitioners,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTIONS PRESENTED

The following questions are presented by this petition for writ of certiorari:

1. Whether the tax imposed by West Virginia Code § 11-13-2m violates Section 2121(a) of the Tax Reform Act of 1976, Pub.L. No. 94-455 (codified at 15 U.S.C. § 391) because it results in a greater tax burden on electricity which is generated in West Virginia and transmitted for sale outside the state than on electricity which is generated and transmitted for sale within the state.

2. Whether the Supreme Court of Appeals of West Virginia properly applied this Court's opinion in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

3. Whether the tax imposed by West Virginia Code § 11-13-2m discriminates against interstate commerce and therefore violates the Commerce Clause of the United States Constitution, as interpreted in *Armco, Inc. v. Hardesty*, —— U.S. —— (1984).

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

All of the parties in the Supreme Court of Appeals of West Virginia are listed in the caption of this case. Their corporate relationships are as follows:

Duquesne Light Company

Duquesne Light Company does not have an ownership interest in any subsidiaries (excepting wholly owned subsidiaries) and is not affiliated with any companies.

Virginia Electric and Power Company (VEPCO)

Virginia Electric and Power Company, doing business as Virginia Power, North Carolina Power, West Virginia Power, and Virginia Natural Gas, is wholly owned by Dominion Resources, Inc., and is affiliated with Dominion Resource Services, Inc.

Virginia Electric and Power Company does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries).

Virginia Electric and Power Company is affiliated with these companies at the following power stations through joint ownership:

Old Dominion Electric Cooperative—North Ann Power Station

Allegheny Power Systems, Inc.—Bath County Pumped Storage

West Penn Power Company, Potomac Edison Company and Monongahelia Power Company

These three companies are affiliated companies and are all owned by Allegheny Power System, Inc., New York, NY 10022.

They have an ownership interest in the following subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company

They are members of the Affiliated Group, Allegheny Power System, Inc., and Affiliated Companies, which is composed of the following:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Allegheny Power Service Corp.
Allegheny Power System, Inc.
Monongahela Power Company
The Potomac Edison Company
West Penn West Virginia Water Power Company
West Virginia Power and Transmission Company

Ohio Power Company and
Appalachian Power Company

Appalachian Power Company and Ohio Power Company are subsidiaries of American Electric Power Company, Inc.

The following companies are affiliates of Appalachian Power Company and Ohio Power Company:

American Electric Power Service Corporation
AEP Energy Services, Inc.
AEP Generating Company
Cedar Coal Co.
Central Appalachian Coal Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Columbus and Southern Ohio Electric Company
Colomet, Inc.
Conesville Coal Preparation Company, Inc.
Simco Inc.
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana & Michigan Electric Company

Blackhawk Coal Company
Price River Coal Co.
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Power Company
Michigan Gas Exploration Co.
Cardinal Operating Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Southern Ohio Coal Company
Windsor Power House Coal Company
Ohio Valley Electric Corporation
Indiana-Kentucky Electric Corporation
Twin Branch Railroad Company
Wheeling Electric Company

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The Petitioners, Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company, and Virginia Electric And Power Company, (hereinafter Petitioners) respectfully pray that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of West Virginia, entered in this proceeding on November 14, 1984, reversing the decision of the Circuit Court of Kanawha County, West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia has not yet been reported. It appears in the Appendix at 1a. That court's order denying the petition for rehearing is printed in the Appendix at 18a.

The final order and corrective order of the Circuit Court of Kanawha County, entering judgment for Petitioners, are printed in the Appendix at pp. 19a-23a.

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia was entered November 14, 1984. A timely petition for rehearing was denied December 21, 1984. This petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTION AND STATUTES

United States Constitution, Article I, Section 8, Clause 3 (the Commerce Clause).

United States Constitution, Article VI, Clause 2 (the Supremacy Clause).

United States Code, 15 U.S.C. § 391, Section 2121(a) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1914.

West Virginia Code §§ 11-13-2b, 11-13-2d, 11-13-2m.

Enrolled Committee Substitute for Senate Bill No. 163, enacted March 11, 1978 (Acts of the West Virginia Legislature, 1978, Chapter 96).

These constitutional and statutory provisions are reproduced in pertinent part in the Appendix beginning at 24a.

STATEMENT OF THE CASE

Petitioners challenge the validity of the West Virginia business and occupation tax imposed by West Virginia Code § 11-13-2m [1] upon those engaged in the business of generating or producing electric power within the State. Petitioners contend this tax discriminates against out-of-state consumers because the tax applies only to West Virginia generation or manufacture which is transmitted out of state. Petitioners seek to have the tax imposed upon their generation activities within the State of West Virginia declared invalid under the Supremacy Clause of the United States Constitution as violative of Section 2121(a) of the Tax Reform Act of 1976 (90 Stat. 1914, codified at 15 U.S.C. § 391) and of the Commerce Clause of the United States Constitution.

On March 11, 1978, the West Virginia Legislature passed the Committee Substitute for Senate Bill No. 163 (Acts of the West Virginia Legislature, 1978, Chapter 96) (Appendix at 29a) which became effective April 1, 1978. Prior to this change in law Petitioners were subject to the .88% manufacturing tax on the generation or production of electric power for sale, profit or commercial use pursuant to § 11-13-2b. Under the new law, those persons who engage in the business of generating or producing electric power for sale, profit or commercial use are placed in a new category, West Virginia Code § 11-13-2m, and are taxed at the rate of 4% on the value of electricity generated by them within West Vir-

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[1] Section 2m provides, in part:

(1) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, *when the sale thereof is not subject to tax under section two-d of this article*, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate * * * * (Emphasis supplied).

ginia. However, those persons who sell power generated within West Virginia to their public utility customers within the state are expressly exempt from the Section 2m tax. Persons engaged in the public utility business in West Virginia are taxed pursuant to West Virginia Code § 11-13-2d at a rate of 4% of gross proceeds on their West Virginia public utility sales which is a reduction of the previously imposed rates of 5.72% or 4.29%. Electric light and power companies which engage in the public utility business in West Virginia but do not generate electric power are taxed pursuant to West Virginia Code § 11-13-2d at a rate of 3% of gross proceeds on their West Virginia public utility sales. Both sections provide for a reduced rate of taxation on generation and sale for in-state manufacturing consumption above specified levels.

Each Petitioner is authorized to do business in West Virginia and owns facilities for the generation of electric energy in West Virginia. Each Petitioner is a public utility in one or more states and is engaged in the business of providing electric power to their public utility customers. Duquesne, Ohio Power and West Penn are not public utilities in West Virginia and only engage in the business of manufacturing or generating electricity in West Virginia for export, and therefore, pay only the Section 2m tax. Appalachian, Monongahela, Potomac Edison and VEPCO engage in both the business of manufacturing electric power for export and in the public utility business in West Virginia, and therefore, are subject to both the Section 2m and Section 2d taxes. It was stipulated in the record that the Section 2m tax is borne almost exclusively by consumers outside West Virginia.

The trial court, the Circuit Court of Kanawha County, West Virginia, heard and decided the case upon a stipulation of facts and declared the tax imposed upon those engaged in the business of generating or producing elec-

tric power within West Virginia pursuant to West Virginia Code § 11-13-2m "invalid and unenforceable because it violates 15 U.S.C. § 391," citing this Court's opinion in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), and Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead?*, 83 W.Va.L. Rev. 79 (1981) in support of its decision.

The Supreme Court of Appeals of West Virginia reversed the judgment of the trial court and held the challenged tax "does not violate the provisions of 15 U.S.C. § 391" and, as noted hereinafter, remanded certain other issues for further action. The Supreme Court of Appeals observed that, when read in isolation, the tax imposed by West Virginia Code § 11-13-2m upon those engaged in the business of generating or producing electric power "is patently discriminatory under *Snead* because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d." Nevertheless, the court concluded that the tax did not violate the Tax Reform Act of 1976 because when the legislative bill of which that tax is a part is read *in pari materia* with the tax imposed by West Virginia Code § 11-13-2d upon those engaged in the public utility business "the manufacturing of electricity that is used in this State is also taxed at the same rate."

Petitioners seek review of the decision of the state Supreme Court of Appeals on the basis that it violates the principle set forth in *Snead* that for purposes of considering a challenge to a state tax under the provisions of Section 2121(a) of the Tax Reform Act of 1976 one must "look narrowly to the type of tax the federal statute names". *Id.* at 149. Since the Act is addressed to state taxes "on or with respect to the generation or transmission of electricity" one cannot consider "the entire tax structure of the State." *Id.* Petitioners contend that the tax imposed by West Virginia Code § 11-13-2d upon those

engaged in the public utility business within the State is a gross receipts tax upon the sale of utility services within West Virginia and is not a tax "on or with respect to the generation or transmission of electricity". Section 2d does not create an equivalent tax burden so as to justify the tax burden imposed by West Virginia Code § 11-13-2m upon those engaged in generating or producing electric power which is transmitted out of state.

This case also calls for the application of the analysis developed by this Court in *Armco, Inc. v. Hardesty*, —— U.S. ——, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). In that case, this Court held the gross receipts tax upon the sale of tangible personal property imposed by West Virginia Code § 11-13-2c could not be deemed a compensating tax for the manufacturing tax imposed by West Virginia Code § 11-13-2b so as to justify excluding from the burden of the tax upon gross sales all such sales by West Virginia manufacturers while imposing the burden of the gross receipts tax upon those foreign manufacturers making wholesale sales within West Virginia. This Court concluded that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of state." *Id.* at ——. This same test should be applied under the Tax Reform Act of 1976 to invalidate the West Virginia tax imposed upon those engaged in the business of producing or generating electric power for transmission and sale outside of the State of West Virginia. Petitioners contend that under that test, generating electric power and operating as a public utility are not "substantially equivalent events" and that the tax imposed at a rate of 4% value on the event of generation within West Virginia for interstate sale cannot be justified as equivalent to a tax at the same rate upon the event of making public utility sales within West Virginia. The exclusion of electric power generated and sold within

West Virginia from the burden of the tax upon electric power generated within West Virginia and sold in other states is discriminatory and invalid under Section 2121 (a) of the Tax Reform Act of 1976.

This case presents an additional factor in that the tax rate imposed pursuant to West Virginia Code § 11-13-2d upon sales by public utilities makes a distinction between electric light and power companies generally and those which do not generate or produce electric power. The Section 2d tax is imposed upon West Virginia sales of electric light and power companies generally and those cent (4%) except that those companies which do not generate or produce electric power are taxed at a rate of three percent (3%) upon their West Virginia sales.[2] Thus, to the extent it could be argued that a portion of the public utility tax on sales of electric light and power companies imposed under Section 2d incorporates a tax on generation, that portion is only a one per cent (1%) tax rate compared with the four percent (4%) tax rate imposed under Section 2m on the generation of electric power sold in interstate commerce.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions sought to be reviewed here were initially raised and fully briefed in the court of first instance, the Circuit Court of Kanawha County, West Virginia. The trial court held that West Virginia Code § 11-13-2m is invalid and unenforceable under the Supremacy Clause of the United States Constitution because it violates 15 U.S.C. § 391 (1976). (Appendix at 1a). The trial court found it unnecessary to reach Petitioner's challenges to the tax under the state and

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[2] In both cases, certain volume sales to manufacturers are taxed at a rate of 2.46%.

federal constitutions. On appeal to the Supreme Court of Appeals of West Virginia, the parties addressed all issues, both the federal statutory and state and federal constitutional issues. The state Supreme Court of Appeals reversed the trial court on the federal statutory issue, but declined to reach the constitutional issues and remanded the case to the trial court for further consideration. (Appendix at 10a-11a). Petitioners filed a petition for rehearing wherein they sought a decision on those constitutional issues without a remand because the facts were stipulated, and because those issues had been fully developed, briefed and argued on appeal. The petition for rehearing was denied December 21, 1984. (Appendix at 18a).

Despite the state supreme court's remand, its decision constitutes a final judgment for purposes of 28 U.S.C. § 1257 as set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), because the issue of the violation of the federal statute finally decided by the Supreme Court of Appeals of West Virginia is virtually certain to survive and require decision by this Court, and further delay necessitated by a remand will seriously erode the federal policy which the Tax Reform Act of 1976 sought to establish.

The state court's ruling on the federal statutory issue is virtually certain to survive further proceedings and require decision by this Court. In any subsequent appeal, regardless of the ruling below on the remaining constitutional issues, this Court will first consider and decide non-constitutional issues. *Harris v. McRae*, 448 U.S. 297 (1980); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582-83 n.22 (1979); *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946). Hence, the only non-constitutional issue involved, the federal statutory issue now before this Court, will be the first issue to be decided in any appeal to this Court. Since decision on that issue cannot be avoided by relying

upon alternate grounds, immediate review is justified. Furthermore, the decision of the court below on the federal statutory issue is final and separable from the constitutional issue and would not be mooted by further state court proceedings. *See Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963).

Moreover, this case falls squarely within the fourth category of cases described in *Cox Broadcasting Corporation v. Cohn, supra*, where an immediate appeal is appropriate from the final decision of the highest court of a state on a federal issue even though additional proceedings in the lower state courts are anticipated. Thus, even though Petitioners "might prevail on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," review in this Court is appropriate because "refusal to review the state court decision might seriously erode federal policy." *Id.* at 482-83. Clearly, the Tax Reform Act of 1976 implemented an important federal policy prohibiting and invalidating taxes "on or with respect to the generation or transmission of electricity" which result, "either directly or indirectly, in a greater tax burden" on electricity consumed outside the state of generation than consumed within that state. *Arizona Public Service Co. v. Snead, supra* at 149, *quoting* Section 2121(a) of the Tax Reform Act of 1976. The discriminatory tax challenged in this case has been imposed upon Petitioners and their customers since 1978, costing Petitioners and their customers tens of millions of dollars annually ($39,669,506 of tax reported under Section 2m for calendar year 1979). Further delay in vindicating this "identifiable federal statutory policy" will undermine that policy and adversely affect plaintiffs and their non-West Virginia customers who bear the tax burden while litigation continues. *See Flynt v. Ohio*, 451 U.S. 619, 622 (1981).

Petitioners also urge this Court to review the Commerce Clause issue since it was fully presented to both the Circuit Court of Kanawha County, West Virginia and the Supreme Court of Appeals of West Virginia. As noted above, the circuit court judge found it unnecessary, as did this Court in *Snead*, to rule on the constitutional issue. However, on appeal to the Supreme Court of Appeals of West Virginia, the State of West Virginia independently presented the Commerce Clause issue to the court and it was fully briefed and argued by the parties. While the highest state court in West Virginia has declined to "decide" the Commerce Clause issue, it is undisputed that the issue has been fully "presented" to that court. The failure of the trial court and the Supreme Court of Appeals of West Virginia to address this issue should not prevent this Court from reaching and deciding it. The applicable facts were stipulated by the parties and no additional evidence would be presented on a remand. All that is required is an application of settled federal constitutional principles to uncontroverted facts. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 482 (1977).

REASONS FOR GRANTING THE WRIT

1. The decision below frustrates the important federal policy expressed by Congress in enacting Section 2121(a) of the Tax Reform Act of 1976 and further delay in obtaining a final resolution will cause irreparable damage to Petitioners and out-of-state consumers.

This case presents the question of whether West Virginia may legally and constitutionally impose a tax upon the generation within West Virginia of electricity transmitted to other states for sale and consumption while excluding from that tax the generation of electricity for sale and consumption within the state. In 1976, Con-

gress emphatically answered this question in the negative by enacting Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391. By enactment of that section Congress established a policy prohibiting the imposition by any state of a tax "on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." The tax imposed by West Virginia Code § 11-13-2m upon those engaged in the business of generating electric power is contrary to that Congressional policy and violates the Act's prohibition of any tax which "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

In *Snead*, this Court interpreted 15 U.S.C. § 391 and found that the New Mexico Electrical Energy Tax was a discriminatory tax. In reaching this decision, the legislative history of the federal act was examined. 441 U.S. at 147-48. The Conference Committee stated in its Report on the Act that Section 2121(a) was intended to prohibit "any State or political subdivision of a State from directly or indirectly imposing any tax on the generation or transmission of electricity which discriminates against out-of-State users." *Id.* at 148, *quoting* H.R. Conf. Rep. No. 94-1515, p. 503 (1976). This is a clear and unequivocal expression of a specific federal policy addressed to the very issue raised and decided by the court below.

As this Court noted in *Snead*, that legislation represented an extension and refinement of principles developed under the Commerce Clause. *Id.* at 149. This Court described the legislation as an exercise of "the broad power of Congress to regulate interstate commerce." *Id.* at 150.

The decision of the Supreme Court of Appeals of West Virginia in this case clearly frustrates that federal policy.

Although this Court in *Snead* held that Congress clearly precluded the consideration of taxes not directed to generation or transmission when determining whether a tax imposed on those activities by one state discriminated against out-of-state residents, the Supreme Court of Appeals of West Virginia upheld West Virginia's generation tax which it conceded "taxes only the manufacturing of electricity which is transmitted out of state" by declaring that the State's public utility tax imposed an equivalent tax on the State's residents. (Appendix at 8a). This is clearly contrary to the Congressionally enacted federal policy as construed by this Court in *Snead*.

The tax imposed by the State of West Virginia upon Petitioners' generation activities in West Virginia constitutes a substantial financial burden upon Petitioners and their out-of-state customers. In calendar year 1979, that latest year for which information is set forth in the record, the tax reported by Petitioners under Section 2m was $39,669,506.00. This case has been pending since 1978 and the total tax bill continues to increase. The burden of that tax continues to be felt by interstate commerce. Immediate review is justified by the irreparable harm to which the Petitioners and their customers continue to be subjected.

2. The court below decided an important federal question in direct conflict with this Court's decision in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

The opinion of the West Virginia Court fails to give effect to the principle set forth in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), that "the federal statutory provision [Section 2121(a) of the Tax Reform Act of 1976] is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State." *Id.* at 149. The court justified the Section 2m tax on

generation of electricity by declaring the State's Section 2d gross receipts tax on sales of public utility services to be equivalent to the Section 2m tax. This approach is contrary to the teachings of this Court in *Snead*.

There is no material difference between the credit mechanism which shielded New Mexico consumers from the burden of the generation tax struck down in *Snead* and the express statutory exclusion which shields West Virginia consumers from the burden of the generation tax in this case. The public service or utility tax imposed by West Virginia upon public utility sales in West Virginia, which West Virginia urges imposes a burden upon in-state residents equivalent to the burden imposed on out-of-state residents by the generation tax, is virtually identical to the New Mexico tax which this Court held in *Snead* could not justify a generation tax which was borne solely by out-of-state residents. Both the New Mexico gross receipts tax upon retail sellers of electricity and the West Virginia public utility tax are measured by receipts from the sale of electricity. That West Virginia enacted its generation tax simultaneously while New Mexico enacted the two taxes analyzed in *Snead* at different times is a distinction without a difference. The West Virginia public utility tax was merely reenacted at a lower rate, and at the same time, as a substitute for the former manufacturing tax applicable to generating, a new Section 2m was added which the West Virginia Court itself described as a tax on "the manufacturing of electricity that is transmitted out of state." Each section applies to a distinct taxable privilege and the West Virginia Court itself recognized that the West Virginia business and occupation tax is composed of a number of separate taxes which are applicable to various and distinct business activities. (Appendix at 8a). The amendment of two sections at one time does not alter the distinct nature of the taxable privileges.

The State's argument that the net effect of the 1978 amendments as a whole "harmonized the tax rate" between domestic and foreign consumers failed to address the fact that the two taxes are imposed upon different events. By its express terms the West Virginia Section 2m generation tax is not "an evenhanded tax on the generation of electricity." 441 U.S. at 150 n.7. As noted in *Snead*, the federal statute requires one "to look narrowly to the type of tax the federal statute names" and only where the taxes involved are upon the incidence of generation or transmission can one consider and compare the burdens. *Id.* at 149-50. The justification that the result is to "harmonize" the tax burden on domestic and out-of-state consumers is no different than the "practical result" justification offered by New Mexico in *Snead* and rejected by this Court. *Id.* at 150 n.7. In each instance the generation tax violates the federal Act because the burden of the tax imposed upon the distinct and isolated event of generation is discriminatory.

Since the analysis and resulting decision of the court below is in direct conflict with this Court's decision in *Snead*, a grant of certiorari to review the erroneous decision is appropriate.

3. The reasoning and analysis of the court below undermines the Commerce Clause policy prohibiting discrimination against interstate commerce and is irreconcilable with this Court's decision in *Armco, Inc. v. Hardesty*, —— U.S. ——, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984).

In *Armco*, this Court ruled that the business and occupation tax imposed by West Virginia under Section 2c (§ 11-13-2c) upon those making wholesale sales, from which local manufacturers were exempt, violated the Commerce Clause of the federal Constitution. The West Virginia Supreme Court of Appeals upheld the tax by finding that all of Armco's activities within the state were a "unitary business", that Armco had a substantial

nexus with the State, and that the total tax was fairly related to the services and benefits provided to Armco by the State. —— W.Va. ——, 303 S.E.2d 706 (1983). The West Virginia court also held that the tax did not constitute an impermissible burden on interstate commerce because while local manufacturers were exempt from the Section 2c gross receipts tax, they paid a much higher manufacturing tax. *Id.* at ——, 303 S.E.2d at 716-17.

This Court reversed, finding that "manufacturing and wholesaling are not 'substantially equivalent events'" and rejected the State's contention that the heavier tax on in-state manufacturers compensated for the lighter burden placed on wholesalers from out of state. —— U.S. at ——, 81 L.Ed.2d at 545.

In the present case, the analysis used by the West Virginia Supreme Court of Appeals to reach its holding that the utility tax imposed under Section 2d is equivalent to the manufacturing tax imposed under Section 2m is the same analysis that this Court rejected in *Armco*. The West Virginia court has incorrectly viewed both sections as a tax upon the business of generating electric power. However, the taxable event in Section 2d is not the business of generating electric power, but rather the privilege of engaging in the utility business in West Virginia and the sale of utility services to West Virginia consumers.

Section 2d makes it clear that the taxable event to which it applies is engaging in the public utility business. Thus, an electric utility making sales within West Virginia is taxed at a 4% rate but the rate is reduced to 3% for those electric utilities which do not generate any of the electric power they sell. It is signifiacnt that the 4% rate applies to all public utility sales by an electric utility not elegible for the lower rate, including that portion of its sales attributable to electric power it purchased from others for resale. The measure of the tax

under Section 2d is the proceeds of the sale rather than the value of the generation. The Section 2d tax is in no way tied or related to the event of generation. On the other hand, the Section 2m generation tax is specifically imposed on the event of generation, and liability for the tax is incurred even though the electricity is sold outside of West Virginia and beyond its taxing jurisdiction.

If for the purpose of argument (and contrary to this Court's teachings in *Armco*), it is assumed that some portion of the business privilege being taxed under Section 2d is generating electric power, the rate of tax on generating is not 4% as the West Virginia court suggests, but rather 1%. By the terms of Section 2d itself, a generating utility pays tax at the rate of 4%, while a non-generating utility pays at the rate of 3% upon the privilege of engaging in the public utility business in West Virginia. It is only the 1% difference in rates that could even arguably be attributed to the privilege of generation.

Since the taxes imposed under Section 2d and Section 2m are not taxes on "substantially equivalent events" and since the Section 2m tax is imposed only on those companies which generate electric power in West Virginia for sale out of state, it is urged that Section 2m violates the Commerce Clause of the United States Constitution.

The standard to be applied in determining whether a tax which burdens interstate commerce violates the Commerce Clause is the four part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The factors to be considered are whether the tax is (1) applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate aginst interstate commerce, and (4) is fairly related to the services provided by the State. *Id.* at 277-78, 287. The Section 2m tax fails the third part of the test because it discriminates aginst interstate commerce.

The Section 2m tax discriminates against interstate commerce because it will result in a greater tax burden on interstate commerce than on intrastate commerce. The analysis set forth by this Court in *Armco* demonstrates this. Under that analysis one looks to whether, if the tax being challenged were to be enacted in every other state, the result would be to impose a greater burden on interstate commerce than on intrastate commerce. —— U.S. ——, 81 L.Ed.2d at 546, *quoting Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, —— (1983). That "mirror image" analysis demonstrates the constitutional infirmity of the West Virginia system of taxation. The very exclusion which West Virginia contends protects West Virginia consumers from double taxation inherently imposes a double tax burden upon interstate commerce.

If every state were to adopt a public utility gross receipts tax upon intrastate sales like that imposed by West Virginia under Section 2d and a generation tax upon value at the place of manufacture like that imposed by West Virginia under Section 2m, and exclude from the burden of the generation tax the generation of electric power the sale of which would be subject to the public utility tax, the greater burden imposed upon interstate commerce is clearly demonstrated. By reason of the exclusion, intrastate sales would bear only the burden of the public utility tax. However, interstate sales would bear the burden of both the generation tax and the public utility tax since the exclusion from each state's generation tax applies only where the sale is subject to that state's public utility tax. Thus, interstate commerce would bear a double tax burden which would not be imposed upon intrastate commerce. The Commerce Clause precludes any state from enacting a tax scheme which so inherently discriminates against interstate commerce. The West Virginia tax imposed pursuant to Section 2m upon those engaged in the business of generating electric power

imposes an impermissible discriminatory burden on interstate commerce and should be struck down as an unconstitutional violation of the Commerce Clause.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1985

APPENDIX

APPENDIX

Chief Justice McHugh and Justice McGraw concur and reserve the right to file concurring opinions.

Justice Neely dissents and reserves the right to file a dissenting opinion.

THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 16067

DUQUESNE LIGHT CO., *et al.*

v.

STATE TAX DEPT., ETC., *et al.*

Kanawha County

Reversed and
Remanded

[Filed Nov. 14, 1984]

Miller, Justice

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1. Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of *Arizona Public Serv. Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

2. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958).

Miller, Justice:

The State Tax Commissioner appeals a decision of the Circuit Court of Kanawha County which struck down our business and occupation tax on the generation of electric power, W. Va. Code, 11-13-2m.[1] The court below held that this case was controlled by *Arizona Public Serv. Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979), in which the United States Supreme Court struck down a New Mexico utility tax because it violated Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1976). We disagree and reverse.

I.

Before addressing the particular facts and issues raised in this case, it is important to understand the *Snead* case. The United States Supreme Court in *Snead* decided the case based upon 15 U.S.C. § 391,[2] which had been enacted because of a discriminatory tax adopted by the State of New Mexico. The purpose of 15 U.S.C. § 391

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[1] The appellees are Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company, and Virginia Electric and Power Company.

[2] 15 U.S.C. § 391 provides:

> "No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

was set out in the Senate Finance Committee Report, which the United States Supreme Court quoted:

> " 'The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries,' " 441 U.S. at 147, 60 L. Ed. 2d at 111, 99 S. Ct. at 1632-33.

As the United States Supreme Court noted, the name of the state was not disclosed in the Committee Report, but during the floor debate, "Senators Domenici and Montoya of New Mexico, Senators Fannin and Goldwater of Arizona and Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax." 441 U.S. at 147, 60 L. Ed 2d at 112, 99 S. Ct. at 1633. Thus, the Supreme Court had before it a legislative enactment directed at a state statute that Congress had declared to be discriminatory.

A critical part of the Court's opinion was its determination that it would not adopt the Commerce Clause Test for determining whether the state tax was discriminatory under 15 U.S.C. § 391. New Mexico urged this test since it "requires examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of state. See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69." 441 U.S. at 149, 60 L. Ed. 2d at 113, 99 S. Ct. at 1633-34. New Mexico's central argument was that if the Court would examine the state's entire utility tax, it would be clear that the tax on utilities

shipping energy out of state was not discriminatory.[3] However, the Court declined to look at the entire tax structure stating:

> "To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute." 441 U.S. at 149-50, 60 L. Ed. 2d at 113, 99 S. Ct. at 1634. (Emphasis in original; footnote omitted)

We observe that New Mexico's Electrical Energy Tax was enacted as a single tax enactment and not as part of a tax plan that affected related areas. Also of some importance is note 7 in *Snead*, 441 U.S. at 150, 60 L. Ed. 2d at 113, 99 S. Ct. at 1634, where the Court stated:

> "The *amici* in this case have pointed to several similar state taxes on the generation of electricity. Pa. Stat. Ann., Tit. 72, § 8101 (Purdon Supp. 1978-1979); Wash. Rev. Code §§ 82.16.020, 82.16.050 (1976); W. Va. Code §§ 11-13-2d, 11-13-2m (Supp. 1978). None of these States, however, has adopted precisely the scheme used by New Mexico, and we express no opinion as to the validity of these or any other state tax laws."

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[3] The United States Supreme Court summarized New Mexico's argument as follows:

> "Power sold within New Mexico, they argue, is subject to a 4% tax: 2% from the electrical energy tax and 2% from the gross receipts tax. By contrast, New Mexico subjects electricity sent out of state only to its 2% generation tax. The appellees contend, therefore, that if there is any discrimination in New Mexico's taxing structure, it is discrimination against electricity consumed within the State." 441 U.S. at 149, 60 L. Ed. 2d at 113, 99 S. Ct. at 1634.

With these salient points from *Snead* in mind, we proceed to discuss our tax.

II.

W. Va. Code, 11-13-2m, was enacted in 1978 as a part of a larger plan to reorganize the business and occupation tax on utilities.[4] Prior to 1978, electric utilities generating or selling electricity in this State were taxed under W. Va. Code, 11-13-2d, at the rate of 5.72 percent based on sales and demand charges for domestic purposes and 4.29 percent on sales and demand charges for all other purposes.[5] Electric utilities generating electricity in this State but transmitting it out of state were taxed under the general manufacturing tax rate under W. Va. Code, 11-13-2b, which was 0.88 percent. *See Virginia Elec. and Power Co. v. Haden*, 157 W. Va. 298, 200 S.E. 2d 848 (1973), *cert. denied*, 416 U.S. 916, 40 L. Ed. 2d 118, 94 S. Ct. 1624 (1974).

As applicable to this case, the material changes made by the 1978 amendments to W. Va. Code, 11-13-1, *et seq.*, were as follows: first, the taxation on manufacturing of electricity was removed from W. Va. Code, 11-13-2b, and placed in a new section, W. Va. Code, 11-13-2m. This section provides that the tax rate would be 4 percent, subject to a provision that the rate would be 2.46 percent on electricity sold to a customer engaged in manufacturing if the contract demand exceeded 200,000 kilowatts per hour per year, or if the usage exceeded 200,000 kilowatts per hour in a year.[6]

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[4] *See* 1978 W. Va. Acts, Ch. 96.

[5] W. Va. Code, 11-13-2d, excepted "income received by municipally owned plants producing or purchasing electricity and distributing same." This exception for municipally owned electric utilities was continued in the 1978 amendments. W. Va. Code, 11-13-2d (1978).

[6] W. Va. Code, 11-13-2m, provides:

"(1) Upon every person engaging or continuing within this State in the business of generating or producing electric power

The 1978 amendments also altered W. Va. Code, 11-13-2d, to provide that electric utilities generating electricity for sale in this State would be taxed at a 4 percent rate, and those which do not generate electricity but supply it are to be taxed at a 3 percent rate. A proviso similar to the one in Section 2m was placed in this section to provide for a reduced rate of 2.46 percent if a manufacturing customer's contract demand exceeded 200,000 kilowatts per hour per year or if the usage exceeded 200,000 kilowatts per hour per year.[7]

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for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundreths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

"(2) The measure of this tax shall be the value of all electric power generated or produced in this State for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article."

[7] The relevant portion of W. Va. Code, 11-13-2d, states:

"Upon any person engaging or continuing within this State in any public service or utility business . . . there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: . . . electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes . . .: Provided, that electric light and power companies

It is quite clear that the 1978 amendments harmonized the tax rate between the generation and sale in this State of electric power and the generation of electric power in this State for transmission out of state. It is true that there is some difference in language between Sections 2d and 2m with regard to measuring the value of the product, i.e., electric power.[8] However, W. Va. Code, 11-13-2, was also amended in 1978 to bring equality to the measurement of the value between Sections 2d and 2m taxes:

> "If any person liable for any tax under sections two-a, two-1 or two-m [§§ 11-13-2a, 11-13-21 or 11-13-2m] shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately be-

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which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes . . .: Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundreths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousands kilowatts per hour in a year . . . . The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

[8] W. Va. Code, 11-13-2d, uses the term "gross income" from "sales and demand charges"; and W. Va. Code, 11-13-2m, uses the term "gross proceeds derived from the sale thereof."

fore transportation out of the state shall be the basis for the assessment of the tax imposed in said section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value." [9]

III.

With this background in mind, we address the issue in this case: does W. Va. Code, 11-13-2m, violate 15 U.S.C. § 391? The circuit court did not elaborate on its holding. The principal argument advanced by the utilities is that Section 2m must be read in isolation. When it is, it is patently discriminatory under *Snead* because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d.

We are cited several cases in which we have held that our business and occupation tax is composed of a number of separate taxes which are applicable to various distinct business activities. *E.g., Virginia Elec. and Power Co. v. Haden, supra*; *United Fuel Gas Co. v. Battle*, 153 W. Va. 222, 167 S.E.2d 890, *appeal dismissed sub nom. United Fuel Gas Co. v. Haden*, 396 U.S. 116, 24 L. Ed. 2d 309, 90 S. Ct. 398 (1969); *Owens-Illinois Glass Co. v. Battle*,

[9] The parties agree that the State Tax Commissioner has by a written memorandum with the appellees adopted a uniform formula for ascertaining the value of electricity under Section 2m, which is known as the VEPCO formula. Under this formula, value is essentially the cost of generation at the place of manufacture plus an allowed rate of return. (Appellees' brief, p. 6-7) The Tax Commissioner argues, and we agree, that with the tax rates being the same, this valuation or measurement yields a lower tax on electric power transmitted out of state, because the measurement of value for electricity generated and sold in this State includes not only the cost of manufacturing and a reasonable rate of return, but the cost of transporting it to the customer (poles, lines, transformers, etc.) as well.

151 W. Va. 655, 154 S.E.2d 854 (1967). Based upon these cases, the argument is made that each section of the business and occupation tax must stand scrutiny separately.

We have not, however, adopted such a rigid view of our business and occupation tax structure. For example, in *Owens-Illinois Glass Co. v. Battle*, we utilized the doctrine of *in pari materia* to settle a question under our business and occupation tax by construing several related provisions.

Moreover, we cannot ignore the fact that the 1978 amendments did more than enact Section 2m. As we have previously stated, several sections of the business and occupation tax which dealt with the manufacturing of electricity were amended. Under well known canons of statutory construction, we are obliged to consider a legislative enactment in its entirety. *Woodring v. Whyte*, —— W. Va. ——, 242 S.E.2d 238 (1978); *Spencer v. Yearce*, 155 W. Va. 54, 180 S.E.2d 868 (1971); Syllabus Point 1, *State ex rel. Holbert v. Robinson*, 134 W. Va. 524, 59 S.E.2d 884 (1950).

If we consider the 1978 amendments in their entirety, it is apparent that the legislature did not single out and tax only the manufacturing of electricity that is transmitted out of state. Under Section 2d, the manufacturing of electricity that is used in this State is also taxed at the same rate.

Our situation is entirely different from what existed in *Snead* where New Mexico had enacted a single tax statute directed at manufacturing electricity which was transmitted out of state. As noted in our analysis of the *Snead* decision, the Court refused to go beyond the confines of the statute to determine from the total framework of New Mexico's tax scheme if the particular tax was in fact discriminatory.

In the present case, the 1978 amendments embody both Sections 2d and 2m. It is clear that both sections tax the business of generating electric power at the same rates. It is also clear that Section 2d deals with in-state generation and sale while Section 2m relates only to in-state generation or manufacture which is transmitted out of state. We find no discrimination between Sections 2d and 2m.

The fundamental fallacy of the appellees' argument is that they would have us limit our analysis to Section 2m, as if the legislative amendments in 1978 involved only this section.[10] We cannot, however, ignore the other sections contained in the 1978 amendments dealing with the manufacture of electrical power.[11]

Consequently, we hold that Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of *Arizona Public Serv. Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979), and the Circuit Court of Kanawha County erred in holding that it did.

IV.

Although both parties have briefed the question of whether the statute violates the Commerce and Equal Protection Clauses of the United States Constitution, as well as the Equal and Uniform Taxation Provision of the West Virginia Constitution, we decline to address these issues because they were not passed upon by the circuit court. We have traditionally held, as indicated in Sylla-

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[10] This was also the mistake in the student analysis on which the trial court relied in part. *See* Note, *West Virginia's Generation of Electricity Tax: Is It Valid After Snead?*, 83 W. Va. L. Rev. 79 (1981).

[11] *See, i.e.*, W. Va. Code, 11-13-2, -2b, -2d and -2m.

bus Point 2 of *Sands v. Sec. Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958), that:

> "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."

See also West Virginia Dept. of Highways v. Delta Concrete Co., —— W. Va. ——, 268 S.E.2d 124 (1980); *Dixon v. American Indus. Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974); Syllabus Point 1, *Pettry v. Chesapeake and Ohio Ry. Co.*, 148 W. Va. 443, 135 S.E.2d 729 (1964).

Because we have found the circuit court in error in its application of *Snead*, we reverse the judgment and remand the case in order that it may consider the other grounds asserted by the appellees in their complaint.

Reversed and Remanded.

[Filed Dec. 3, 1984]

Neely, Justice, concurring: [1]

I concur to mention some additional distinctions between our business and occupation tax structure and the electrical energy tax that was held invalid in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). Under the taxing scheme enacted by the State of New Mexico, a producer of electricity in New Mexico who sold the electricity out-of-state paid a 2 percent tax that would not have been collected if the electricity had been sold in New Mexico. In effect, then, New Mexico taxed separately the production of electric power for export.

Under New Mexico law distributors of electrical energy were liable to payment of a gross receipts tax of 4 percent.[2] This tax, enacted in 1953, was not related to electricity generation; the utility would have paid the same 4 percent if it had been a door-to-door distributor of bubble gum.[3]

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[1] Originally I noted a possible dissent in this case because it appeared that the West Virginia situation was controlled by *Arizona Public Service v. Snead, infra.* But as I methodically worked through the New Mexico and West Virginia tax schemes, my dissent became a concurrence. I now agree with the majority's opinion and add this concurrence only to explain my own reasoning in the hope that I might save work for others.

[2] NMSA 7-9-1 to 7-9-81 [1978] sets out New Mexico's general excise tax.

[3] The tax imposed on the New Mexico electric utilities was a general excise tax that applied in equal measure to all other businesses within the State. That section, NMSA 7-9-4 [1983], in its present incarnation reads: "A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico. B. The tax imposed by this section shall be referred to as the 'gross receipts tax.'"

When the New Mexico electrical energy tax[4] was imposed, the statute gave credit for the electrical energy tax against the New Mexico gross receipts tax—a credit that could be used only by in-state, New Mexico producers/distributors. Thus, although New Mexico was entitled to tax the production of electrical energy, it failed to tax both the domestic and foreign producers equally because New Mexico, in effect, refunded the tax to domestic producers through a tax credit that applied to an entirely unrelated tax. That is the difference between *pre-Snead* New Mexico and today's West Virginia. What if New Mexico had given compensating credits against domestic producers' turnpike tolls or had given them a credit toward the New Mexico vehicle licenses of power company trucks? These examples make clear that the electrical energy tax and its compensating credit for in-state producers explicitedly discriminated against interstate commerce.

West Virginia does not refund the electricity generation tax to domestic producers; West Virginia taxes domestic producers more heavily because they *do* more in West Virginia. But at first blush West Virginia's scheme appears similar to New Mexico's scheme because we have one subsection of the *West Virginia Code* that applies to foreign producers and another that applies to domestic producers. Our tax for both domestic and foreign producers, however, is calculated on exactly the same basis, namely on the value of electricity manufactured, transmitted, and distributed.

The structure of *W. Va. Code*, 11-13-2d [1978] and 11-13-2m [1978] discloses that West Virginia taxes all the electrical utilities equally along a continuum that

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[4] NMSA 7-18-1 to 7-18-6 [1978]. New Mexico's electrical energy tax, repealed in 1982, related to the imposition and rate of tax on the generation of electricity and required reports or remittances of persons subject to the tax.

starts with manufacture of the power and ends with its delivery to the consumer. New Mexico's tax was levied *only* upon electricity *manufactured*; the credit, however, was against gross domestic *sales*. In evaluating the applicability of *Snead, supra*, to the West Virginia business and occupation tax it is important to point out that the New Mexico tax gave credit for one type of tax—an electrical energy tax—against another type of tax, namely a sales tax.

In state statutes that affect interstate commerce, words of art or characterizations can be more significant than in almost any other area of law. Phrases such as "privilege of doing business" or "general excise" can make or break a state statute. The Supreme Court has held that such "magic words or labels" cannot validate an otherwise invalid tax, but may be capable of disabling "an otherwise constitutional levy." *Railway Express Agency v. Virginia*, 358 U.S. 434, at 441 (1959).

Under the Supreme Court's recent view of state taxation of interstate commerce, a state tax on the "privilege of doing business" is not *per se* unconstitutional in the absence of a claim "that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayers, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, at 287 (1977), *reh. den.* 430 U.S. 976 (1977). Accordingly, West Virginia's business and occupation tax passes constitutional muster. The entire process of providing electricity to the ultimate consumer is taxed. If the whole process goes on in West Virginia, then West Virginia taxes manufacture, transmission, and distribution. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture. Thus the tax is fairly apportioned and violates neither the *Constitution of the United States* or 15 U.S.C. § 391 (1976).

In order to understand the legality, under *Snead, supra*, of West Virginia's business and occupation tax structure as applied to out-of-state utilities one must look for a moment at the nature of the electric utility business. Approximately 90.8 percent of the value of electrical energy at the point of consumption is attributable to the *cost of manufacture*. For example, if we study the 1983 Annual Report of the Appalachian Power Company we find that its production of power (manufacture) expenses were $495,741,691 while its bulk transmission costs were only $15,981,809 and its cost of low voltage distribution to consumers was only $41,147,842. Consequently, the biggest overall activity in the electric utility business is manufacture.

The only reason that West Virginia taxes generation of power for out-of-state consumption under *W. Va. Code*, 11-13-2m [1978] and generation for in-state consumption under *W. Va. Code*, 11-13-2d [1978] is so that out-of-state producers will *not* pay tax on the value of transmission and distribution activities. The tax for in-state consumption is higher than the tax on out-of-state consumption because West Virginia also taxes transmission and distribution for in-state producers. Under the West Virginia business and occupation tax statutes everything that an electric utility does in the State of West Virginia—whether a foreign or domestic producer—is taxed at 4 percent. Manufacturers of electrical energy for sale inside West Virginia are treated exactly as manufacturers of electrical energy for sale outside of West Virginia.

For our purposes here it is important to point out that West Virginia makes no effort to exempt in-state producers and distributors from the burden of the tax on electrical energy production. This lack of discrimination is made possible because West Virginia has always had a business and occupation tax on the public utility business. New Mexico ran afoul of 15 U.S.C. § 391 (1976)

because, for all intents and purposes, New Mexico taxed out-of-state producers on the basis of generation and in-state producers on the basis of gross receipts (sales). Since New Mexico relied upon a gross receipts (sales) tax to raise revenue from producers of electricity *in New Mexico* it had no choice but to enact a subsequent special electrical energy tax to capture revenue from utilities generating power in New Mexico to be *sold outside* of New Mexico. Without New Mexico's 2 percent tax credit against the gross receipts tax, New Mexico consumers would have had their rates increased by 2 percent.

What New Mexico did was entirely logical, but also probably unconstitutional; at least we know that it was against the subsequently enacted 15 U.S.C. § 391 (1976). In New Mexico's case the substance of the tax was reasonable but the form was unconstitutional. The Supreme Court's overruling of *Specter Motor Service v. O'Connor*, 340 U.S. 602 (1951) in *Complete Auto Transit Inc. v. Brady, supra*, implies that triumphs of form over substance are no longer fashionable in determining whether a tax is a burden on interstate commerce. At some point, however, form becomes substance: it is a fine line, but it was crossed by New Mexico. Under *Complete Auto, supra*, West Virginia is on the constitutional side of the line as well as being within 15 U.S.C. § 391 (1976).

It may appear initially that the distinction between New Mexico's 2 percent credit for the electrical energy tax against the New Mexico gross receipts tax *versus* West Virginia's exemption from the operation of *W. Va. Code*, 11-13-2m [1978] for local utilities paying tax under *W. Va. Code*, 11-13-2d [1978] is a distinction without a difference. But nothing could be father from the truth: there is a difference and that difference relates to the fact that West Virginia producers and distributors of electricity are not exempt from the burden of *W. Va. Code*, 11-13-2m [1978] but, rather, are subjected to exactly the same burden plus the *additional* tax on trans-

mission and distribution provided in *W. Va. Code*, 11-13-2d [1978]. If, indeed, we had imposed a special tax on the generation of electric power and then given West Virginia producers/distributors of power a credit against an entirely unrelated sales tax we would be within the purview of *Arizona Public Service Co. v. Snead, supra.* But we didn't!

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of December, 1984, the following order was made and entered, to-wit:

16067

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
and VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs Below, Appellees

vs.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants Below, Appellants

The Court having maturely considered the petition for rehearing and reargument filed in the foregoing case on December 13, 1984, is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ George W. Singleton
Clerk
Supreme Court
of Appeals

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. CA-78-1986

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
and VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, AS SUCCESSOR TO
DAVID C. HARDESTY, JR., STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants.

FINAL ORDER

Upon the facts and for the reasons set forth in Plaintiff's Brief and Plaintiff's Reply to Defendant's Brief, which briefs are incorporated herein by reference, the Court does hereby DECLARE and ORDER that West Virginia Code, 11-13-2m (1978) is invalid and unenforceable because it violates 15 U.S.C. § 391 (1976). *See Arizona Public Service Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979); Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead*, 83 W. Va. L. Rev. 79 (1981). The Court consequently concludes that it is not necessary to, and does not, address the other grounds raised by the Plaintiffs upon which the tax in question is allegedly invalid.

The Court does, accordingly, hereby further ORDER that the Defendants are enjoined and restrained from assessing and collecting or otherwise enforcing the tax in question.

The Court does hereby further ORDER that a certified copy of this FINAL ORDER be sent to counsel of record for the parties.

The Court notes the objection of the Defendants to this FINAL ORDER.

Entered this 4th day of August, 1983.

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.,
Judge
13th Judicial Circuit of
West Virginia

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, S.S.

I, Phyllis Jean Cole, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and signed by the Court this 8th day of Aug.

/s/ Phyllis Jean Cole
Clerk
Circuit Court
Kanawha County
West Virginia

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

Civil Action No. CA-78-1986

DUQUESNE LIGHT COMPANY,
OHIO POWER COMPANY,
WEST PENN POWER COMPANY,
APPALACHIAN POWER COMPANY,
MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
and VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA and
HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Defendants.

CORRECTIVE ORDER

This day came the Defendants, by William F. Carroll, Deputy Attorney General, their counsel, and came also the Plaintiffs, by Robert E. Magnuson and William W. Booker, their counsel, for hearing upon the Defendants' "Motion for Findings of Facts" and the Court, having considered said motion and the memoranda of law and oral argument of counsel thereon, is of the opinion that, pursuant to Rule 60(b) R.C.P., the final judgment order of the Court, dated August 4, 1983 entered in this action, should be corrected, and it is, therefore, ORDERED that said final judgment order of August 4, 1983, is hereby amended to read as follows:

FINAL ORDER

Upon the facts set forth in the written stipulation of the parties, dated December 21, 1982, consisting of two hundred and thirty-three typewritten pages, together with forty-nine (49) Stipulation Exhibits bound in two (2) volumes, labeled Volume No. I and Volume No. II, respectively, Volume No. I containing Stipulation Exhibit Numbers 1 through 15, inclusive, and Volume No. II containing Stipulation Exhibit Numbers 16 through 49, inclusive, which said Stipulation and Stipulation Exhibits were filed and made part of the record in this action by order entered on December 21, 1982, the Plaintiffs' Brief, the Defendants' Brief and the Plaintiffs' Reply to the Defendants' Brief, which said briefs are incorporated herein by reference, the Court does hereby DECLARE and ORDER that West Virginia Code, 11-13-2m (1978) is invalid and unenforceable because it violates 15 U.S.C. § 391 (1976). *See Arizona Public Service Co. v. Snead*, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979); Note, *West Virginia Generation of Electricity Tax: Is It Valid After Snead*, 83 W. Va. L. Rev. 79 (1981). The Court consequently concludes that it is not necessary to, and does not, address the other grounds raised by the Plaintiffs upon which the tax in question is allegedly invalid.

The Court does, accordingly, hereby further ORDER that the Defendants are enjoined and restrained from assessing and collecting or otherwise enforcing the tax in question.

The Court does hereby further ORDER that a certified copy of this FINAL ORDER be sent to counsel of record for the parties.

The Court notes the objection of the Defendants to this FINAL ORDER.

Entered this 13th day of September, 1983.

/s/ Herman G. Canady, Jr.
HERMAN G. CANADY, JR.
Judge
13th Judicial Circuit of
West Virginia

CONSTITUTION AND STATUTES

United States Constitution:

Article I, Section 8, Clause 3 (the Commerce Clause)

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

Article VI, Clause 2 (the Supremacy Clause)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2121(a), Tax Reform Act of 1976 (15 U.S.C. § 391) Tax on or with respect to generation or transmission of electricity

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

(Pub.L. 86-272, Title II, § 201, as added Pub.L. 94-455, Title XXI, § 2121(a), Oct. 4, 1976, 90 Stat. 1914.)

West Virginia Code:

§ 11-13-2b. Manufacturing, compounding or preparing products; processing of food; exception of generated or produced electric power by public utilities or others; treatment accorded

electricity generated by manufacturers for own use; valuation of timber products.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or in part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), except electric power produced by public utilities or others, the amount of the tax to be equal to the value of the article, substance, commodity or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one-hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in the State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. The value of electricity generated by persons taxed under the provisions of this section, which electricity is directly used by such persons in the business of manufacturing and not sold or otherwise transferred or transmitted to others, shall be exempt from the imposition of any tax under this article. With respect to the manufacturing, compounding or preparing for sale of timber or timber products, the measure of this tax is the value of the entire timber product manufactured, compounded or prepared in the State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State but such value shall not include the value of any timber or timber products used as ingredients, components, or elements of such timber products. The dressing and processing of food by a person, firm or corpora-

tion, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of those products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provded in section two-c [§ 11-13-2c].

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this State and partially manufactures, compounds or prepares such products outside of this State the measure of this tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of this tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles. (1935, c. 86; 1951, c. 179; 1955, c. 165; 1959, c. 167; 1967, c. 188; 1971, c. 169; 1974, c. 133; 1978, c. 96; 1982, c. 124; 1982, 1st Ex. Sess., c.5.)

§ 11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this State in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent, except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, except as to income

received by municpally owned plants producing or purchasing electricity and distributing same: Provided, that electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriation section or sections of this article. (1935, c. 86; 1955, c. 165; 1959, c. 167; 1971, c. 169; 1978, c. 96.)

§ 11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this State in the business of generating or producing elec-

tric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this State for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article. (1978, c. 96.)

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 163

(By Mr. Oates)

[Passed March 11, 1978; in effect April 1, 1978.]

AN ACT to amend and reenact sections two, two-b, two-d two-k, three-b and twenty-five, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article thirteen by adding thereto a new section, designated section two-m; and to amend and reenact section two, article thirteen-c of said chapter eleven, all relating to business and occupation taxes; imposition of privilege taxes on privileges of generating or producing electric power and on supplying of public service by electric light and power companies; establishing rates and measures of such taxes; establishing rate of tax on electric light and power companies which supply public service but which do not produce electric power; establishing rate of tax on electric power used in certain quantities at plant locations of manufacturers; clarifying tax treatment of electricity generated by manufacturers for own use; relating to tax credit for industrial expansion; and expanding definition of "industrial taxpayer" to include persons exercising privilege of generating or producing electric power.

Be it enacted by the Legislature of West Virginia:

That sections two, two-b, two-d, two-k, three-b and twenty-five, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article thirteen be further amended by adding thereto a new section, designated section two-m; and that section two, article thirteen-c of said chapter eleven be amended and reenacted, all to read as follows:

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

§ 11-13-2. Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive, of this article.

If any person liable for any tax under sections two-a, two-b, two-l or two-m shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in said section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value

upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a, two-b, two-l and two-m of this article shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a, two-b, two-l or two-m of this article and engaging in the business of selling his natural resources, manufactured products, or electricity at retail in this state shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c of this article for the privilege of engaging in the business of selling such natural resources, manufactured products or electricity at retail in this state. But any person exercising any privilege taxable under sections two-a, two-b, two-l or two-m of this article and engaging in the business of selling his natural resources, manufactured products, or electricity to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c of this article.

Persons exercising any privilege taxable under section two-b or two-m of this article shall not be required to pay the tax imposed in section two-c of this article for the privilege of selling their manufactured products or electricity for delivery outside of this state, but the gross income derived from the sale of such products or electricity outside of this state shall be included in determining the measure of the tax imposed on such person in section two-b or two-m.

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under sections two-a and two-l, and using or consuming the same in his business or transferring or delivering the same as any royalty payment, in kind, or the like, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe.

§ 11-13-2b. Manufacturing, compounding or preparing products; processing of food; exception of generated or produced electric power by public utilities or others; treatment accorded electricity generated by manufacturers for own use.

Upon every person engaging or continuing within this state in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), except electric power produced by public utilities or others, the amount of the tax to be equal to the value of the article, substance, commodity or newspaper, manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale

thereof by the manufacturer or persons compounding or preparing the same, except as otherwise provided, multiplied by a rate of eighty-eight one-hundredths of one percent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this state for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the state. The value of electricity generated by persons taxed under the provisions of this section, which electricity is directly used by such persons in the business of manufacturing and not sold or otherwise transferred or transmitted to others, shall be exempt from the imposition of any tax under this article. The dressing and processing of food by a person, firm or corporation, which food is to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c.

It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within this state and partially manufactures, compounds or prepares such products outside of this state the measure of his tax under this section shall be that proportion of the sale price of the product that the payroll cost of manufacturing within this state bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that the cost of operations in West Virginia bears to the full cost of manufacture of the articles.

§ 11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this state in any public service or utility business, except rail-

road, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same: *Provided*, That electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: *Provided, however*, That the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the

United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

§ 11-13-2k. Banking and other financial business; legislative findings.

Upon every person engaging or continuing within this state in the business of banking or financial business, from and after the first day of April, one thousand nine hundred seventy-one, the tax shall be equal to one and fifteen one-hundredths percent of the gross income received from interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents from real or tangible personal property, however denominated, royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property: *Provided*, That gross income shall not include (a) interest received on the obligations of the United States, its agencies and instrumentalities, (b) interest received on the obligations of this or any other state, territory or possession of the United States, or any political subdivision of any of the foregoing or of the District of Columbia, or (c) interest received on investments or loans primarily secured by first mortgages or deeds of trust on residential property occupied by nontransients: *Provided, however*, That all interest derived on activities exempt under (c) above, shall be reported, as to amounts, on the return of a person taxable under the provisions of this section.

Persons taxed pursuant to the provisions of this section shall not be taxed under sections two-a to two-j, inclusive, or sections two-l or two-m of this article.

The Legislature hereby finds and declares that it is the intent of the Legislature to subject national banking associations and other financial organizations to the tax imposed by this article, in accordance with the authorization contained in section five thousand two hundred nineteen of the revised statutes of the United States as amended by Public Law 91-156 enacted the twenty-fourth day of December, one thousand nine hundred sixty-nine.

§ 11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this state for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this state: *Provided*, That the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article.

§ 11-13-3b. Definitions; reduction allowed in tax due; how computed.

When used in this section, the phrase "normal tax" shall mean the tax computed by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive, of this article, less exemption at the rate of fifty dollars annually or at the rate of four dollars and sixteen cents per month for the period actually engaged in business.

The normal tax shall be computed by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive, of this article.

§ 11-13-25. Cities, towns or villages restricted from imposing additional tax.

Notwithstanding the provisions of section five, article thirteen, chapter eight of this code, no city, town or village shall impose a business and occupation tax:

(a) Upon occupations or privileges taxed under sections two-a, two-b, two-c two-d, two-e, two-g, two-h, two-i and two-j of this article, in excess of rates in effect under this article on January one, one thousand nine hundred fifty-nine;

(b) Upon occupations or privileges taxed under section two-k of this article, in excess of one percent of gross income;

(c) Under section two-l of this article; or

(d) Upon occupations or privileges taxed under section two-m of this article, in excess of the tax rate applicable to such occupations or privileges under section two-b of this article on January one, one thousand nine hundred fifty-nine.

ARTICLE 13C. BUSINESS AND OCCUPATION TAX CREDIT FOR INDUSTRIAL EXPANSION.

§ 11-13C-2. Meaning of terms; "industrial taxpayer" defined.

(a) Any term used in this article shall have the same meaning as when used in comparable context in article thirteen of this chapter, unless a different meaning is clearly required by the context or by definition in this article.

(b) The term "industrial taxpayer" when used in this article shall mean any person liable for tax under article thirteen of this chapter exercising any of the following privileges:

(1) Any privilege taxable under section two-b or two-m of article thirteen of this chapter.

(2) Any privilege taxable under section two-h of article thirteen of this chapter: *Provided*, That such privilege is manufacturing for another, which privilege would be taxable under section two-b or two-m of article thirteen of this chapter if title to the raw materials involved in the manufacturing process were vested in the taxpayer exercising the privilege taxable under section two-h of article thirteen of this chapter.

ARTICLE 13C. BUSINESS AND OCCUPATION TAX CREDIT FOR INDUSTRIAL EXPANSION.

§ 11-13C-2. Meaning of terms; "industrial taxpayer" defined.

(a) Any term used in this article shall have the same meaning as when used in comparable context in article thirteen of this chapter, unless a different meaning is clearly required by the context or by definition in this article.

(b) The term "industrial taxpayer" when used in this article shall mean any person liable for tax under article thirteen of this chapter exercising any of the following privileges:

(1) Any privilege taxable under section two-b or two-m of article thirteen of this chapter.

(2) Any privilege taxable under section two-h of article thirteen of this chapter: *Provided,* That such privilege is manufacturing for another, which privilege would be taxable under section two-b or two-m of article thirteen of this chapter if title to the raw materials involved in the manufacturing process were vested in the taxpayer exercising the privilege taxable under section two-h of article thirteen of this chapter.

Office - Supreme Court, U.S.
FILED
MAR 22 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-1341

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DUQUESNE LIGHT COMPANY, OHIO POWER COMPANY, WEST PENN POWER COMPANY, APPALACHIAN POWER COMPANY, MONONGAHELA POWER COMPANY, THE POTOMAC EDISON COMPANY, AND VIRGINIA ELECTRIC AND POWER COMPANY,

Petitioners,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA AND HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

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STATE OF WEST VIRGINIA

BEST AVAILABLE COPY

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STATEMENT OF THE CASE

On March 11, 1978, the West Virginia Legislature enacted Enrolled Committee Substitute for Senate Bill No. 163, Chapter 96, Acts of the Legislature, Regular Session, 1978, amending and reenacting certain sections of the State's Business and Occupation Tax embodied in Chapter 11, Article 13, of the West Virginia Code of 1931, as amended, and adding a new section to the statute and further amending and reenacting W. Va. Code § 11-13C-2 relating to Business and Occupation Tax credit for industrial expansion.

Summarized briefly, the amendments of 1978, hereinafter referred to as the 1978 Act, involved the following

sections of the Business and Occupation Tax statute:

(a) Code 11-13-2. This section imposes the Business and Occupation Tax and is the provision of the 1978 Act on or with respect to the generation or transmission of electric power which prescribes the measure of the tax to be paid by persons generating electricity in West Virginia which is transmitted for sale in other states.

(b) Code 11-13-2b. This section prescribes the rate of tax to be paid by persons engaged within the State in the business of manufacturing, except the generation of electricity. The 1978 amendments removed persons engaged in the business of generating electricity from taxation under this section.

(c) Code 11-13-2d. This section prescribes the rate of tax to be paid by persons engaged within the State in the business of a public utility. Since the bulk of the domestic sales of electric power in West Virginia is made by public utilities, Code 11-13-2d is the principal provision of the 1978 Act on or with respect to the generation or transmission of electricity for sale within the State. The 1978 amendments lowered the tax rates prescribed to be paid by electric utilities and created a new tax category for nongenerating electric utilities.

(d) Code 11-13-2k. This section prescribes the rate of tax to be paid by persons engaged within the State in the banking and financial business.

(e) Code 11-13-2m. This was the new section added to the Business and Occupation Tax Statute by the 1978 Act, prescribing the rate of tax to be paid by persons engaged within the State in the business of generating electric power for sale, profit, or commercial use which is not subject to taxation under Code 11-13-2d, the public utility classification. Since the bulk of electric power subject to taxation under Code 11-13-2m is transmitted for sale in other states, Code 11-13-2m is the provision of the 1978 Act on or with respect to the generation or transmission of electricity for sale outside West Virginia.

(f) Code 11-13-3b. This section defines the phrase "normal tax" and prescribes the method of computing "normal tax."

(g) Code 11-13-25. This section limits the rates of the Business and Occupation Tax which municipalities may impose.

The amendment to the statute pertaining to the Business and Occupation Tax credit for industrial expansion contained in the 1978 Act involved Code 11-13C-2, wherein the definition of the term "industrial taxpayer" was expanded to include persons engaged in the business of producing electric power.

As indicated above, the 1978 Act is not simply a statute pertaining solely to electric power. It is actually a congeries of measures involving West Virginia's Business and Occupation Tax.

The provisions of the 1978 Act raised by the Petition are Code 11-13-2; Code 11-13-2d; and Code 11-13-2m.

The Petitioners have singled out Code 11-13-2m as the focal point of their attack on the 1978 Act. Code 11-13-2m prescribes the rate of tax to be paid by persons engaged in this State in the business of generating electric power which is not subject to taxation under Code 11-13-2d, the public utility classification. This exclusionary provision in Code 11-13-2m, Petitioners charge, renders the 1978 Act violative of the Tax Reform Act of 1976, Section 2121(a), 90 Stat. 1914, codified at 15 U.S.C. § 391, also embodied in 15 U.S.C.A. § 391, hereinafter referred to sometimes as Section 391. However, Code 11-13-2 is of especial significance to the case at bar. Not only does this part of the 1978 Act impose the West Virginia Business and Occupation Tax, but it

prescribes as the measure of the tax to be paid by persons engaged in this State in the business of manufacturing, including the generation of electricity, whose goods are transported outside West Virginia prior to sale, the value of such products immediately before shipment to other states. In contrast to this measure, Code 11-13-2d, also a part of the 1978 Act, prescribes that the measure of the tax to be paid by any person generating electric power within West Virginia which he sells domestically as a public utility is the gross proceeds of the sale.

The difference in the measure of the tax prescribed by the 1978 Act, with respect to electric power generated in West Virginia which is sold domestically and that which is transported outside

the State, has a profound effect on the amount of tax to be paid by the ultimate consumer, and is the key to understanding the case at bar.

Included in the gross receipts measure of the tax prescribed by Code 11-13-2d are all costs attendant upon the generation and delivery of the product within this State. The tax prescribed by Code 11-13-2d, measured by gross receipts of sale, is passed on to be paid ultimately by their West Virginia customers in the form of rates by companies engaged in the public utility business within the State. However, in the case of companies subject to the tax under Code 11-13-2m generating electricity which is transmitted outside the State the measure of the tax is limited by Code 11-13-2 to the value of such

electricity in West Virginia immediately prior to transmission outside the State. Thus, transportation, distribution, and other costs of electricity generated in West Virginia and transported outside the State are excluded from the measure of the tax prescribed by Code 11-13-2m, which tax is passed on by the generating companies to their out-of-State customers.

The applicable federal statute, Section 391, forbids the imposition of a state tax on or with respect to the generation or transmission of electricity which results either directly or indirectly in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

When the 1978 Act is analyzed in terms of Section 391, it is clear that electricity taxed according to its value in West Virginia prior to transportation outside the State bears a lower tax burden than does electricity taxed according to the gross receipts of sale within the State.

A tax measured by the value of electricity in West Virginia prior to transportation outside the State (Code 11-13-2m; Code 11-13-2) paid by out-of-State consumers of electricity generated in West Virginia results in a lesser tax burden to such consumers than does a tax measured by the gross receipts of sale of electricity generated in the State (Code 11-13-2d) paid by West Virginia customers of public utilities.

Respondents submit, therefore, that insofar as the cost of electric power generated in West Virginia is influenced by the 1978 Act, the difference in the respective measures of the tax prescribed by Code 11-13-2d and Code 11-13-2m insures that the out-of-State consumers pay much less for West Virginia-generated electric power than do their counterparts within the State.

INACCURACIES CONTAINED IN PETITIONERS' STATEMENT OF THE CASE

Petitioners allege in their Statement of the Case that Code 11-13-2m "discriminates against out-of-State consumers because the tax applies only to West Virginia generation or manufacture which is transmitted out of State." (Petition, p. 3.)

By its express terms, Code 11-13-2m is not limited in its application to electricity generated in West Virginia which is transmitted to other states. Code 11-13-2m provides that the measure of the tax shall be the value of all electric power generated within the State for sale, profit, or commercial use regardless of the place of sale or the fact that transmission may be to points outside the State. The only exclusions from taxation contained in Code 11-13-2m are electricity subject to taxation under Code 11-13-2d and electricity produced by municipally owned power plants.

Accordingly, the non-utility sale in West Virginia by the producer of electric power generated by him in this State is subject to taxation under Code

11-13-2m upon the gross proceeds of the sale. Although the bulk of the electric power generated in West Virginia by Petitioners is transmitted for sale outside the State, this provision of Code 11-13-2m would be applicable to any in-State non-utility sale of its West Virginia-generated electricity made by any of the Petitioners.

Petitioners further allege in their Statement of the Case that the West Virginia Supreme Court of Appeals "observed that, when read in isolation, the tax imposed by West Virginia Code 11-13-2m upon those engaged in the business of generating or producing electric power 'is patently discriminatory under Snead because it taxes only the manufacturing of electricity which is transmitted out of State, and excludes in-State

manufacturing by its reference to Section 2d.'" (Emphasis in original.) (Petition, p. 5.)

Respondents submit that this quotation from the State Court's opinion is taken out of context. The full statement of the Court is as follows:

> "The principal argument advanced by the utilities is that Section 2m must be read in isolation. When it is, it is patently discriminatory under Snead because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d.
>
> "We are cited several cases in which we have held that our business and occupation tax is composed of a number of separate taxes which are applicable to various distinct business activities. E.g., Virginia Elec. and Power Co. v. Haden, supra; United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, appeal dismissed sub nom. United Fuel Gas Co. v. Haden, 396 U.S. 116, 24 L. Ed. 2d

> 309, 90 S. Ct. 398 (1969); Owens-Illinois Glass Co. v. Battle, 151 W. Va. 655, 154 S.E.2d 854 (1967). Based upon these cases, the argument is made that each section of the business and occupation tax must stand scrutiny separately." See Appendix, Part A, pp. a16-a18.

When these remarks are fairly read in their complete context, it is clear that rather than rendering a pronouncement as to the validity or invalidity of Code 11-13-2m at that point in the opinion, as Petitioners contend, the West Virginia Court was merely summarizing the principal argument advanced by Petitioners before the Court (and before this Court) in support of their claim that Code 11-13-2m is invalid, viz: that it must be viewed in isolation from the rest of the 1978 Act. This view is further supported by the Court's additional observation:

> "The fundamental fallacy of the appellees' argument is that they would have us limit our analysis to Section 2m, as if the legislative amendments in 1978 involved only this section." See Appendix, Part A, p. a20-a21.

Based upon their faulty reading of the opinion, the Petitioners suggest at p. 5 of the Petition that the West Virginia Supreme Court of Appeals rendered a judgment that Code 11-13-2m was invalid, but upheld the statute nevertheless. Respondents submit that the passages quoted above from the State Court's opinion of their own force refute Petitioners' inference.

SUMMARY OF ARGUMENT

Unlike the New Mexico Electrical Energy Tax Act invalidated as violative of Title 15 U.S.C. § 391 by this Court in Arizona Public Service Company v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106,

99 S. Ct. 1629 (1979), West Virginia has placed its statutes relating to the electric power business conducted within the State in several sections of the Business and Occupation Tax statute.

Under the settled practice of the West Virginia Supreme Court of Appeals, the various sections of the Business and Occupation Tax statute are considered in pari materia. The provisions on or with respect to the generation or transmission of electricity within the State are Code 11-13-2, Code 11-13-2d, and Code 11-13-2m, herein referred to collectively as the 1978 Act.

Code 11-13-2d is the provision of the 1978 Act on or with respect to the generation or transmission of electricity for sale by public utilities within the State, prescribing a rate of 4

percent of tax on the gross proceeds of sale. The bulk of the electric power sold in West Virginia is subject to taxation under Code 11-13-2d, which is the principal taxing section of the 1978 Act on or with respect to the generation or transmission of electric power for sale in West Virginia. Code 11-13-2m also pertains to the generation and sale of electricity in West Virginia but excludes generated electricity, the sale of which is subject to taxation under Code 11-13-2d. The bulk of the electric power subject to taxation under Code 11-13-2m is transmitted for sale in other states, and this section is the provision of the 1978 Act on or with respect to the generation or transmission of electricity which is sold outside West Virginia. Through the mechanism of Code

11-13-2, the measure of the tax under Code 11-13-2m on generated electricity to be sold in other states is limited to its value immediately before shipment outside West Virginia. The tax on electricity subject to taxation under Code 11-13-2m is computed at the rate of 4 percent of the value thereof immediately prior to transmission outside the State.

A tax computed on 4 percent of the value of electricity in West Virginia prior to transportation outside the State in interstate commerce (Code 11-13-2m; Code 11-13-2), paid by out-of-State consumers of electricity generated in the State, results in a lesser tax burden to such consumers than does a tax computed on 4 percent of the gross receipts of sale in intrastate commerce of electricity generated in the State (Code

11-13-2d) paid by West Virginia consumers.

The federal statute involved, 15 U.S.C. § 391, herein sometimes referred to as Section 391, forbids the imposition of a state tax on or with respect to the generation or transmission of electric power which results either directly or indirectly in a greater tax burden on electricity generated or transmitted in interstate commerce than on electricity generated or transmitted in intrastate commerce. The New Mexico Electrical Energy Tax Act was held violative of Section 391 in Snead.

The West Virginia statutes on or with respect to the generation or transmission of electric power within the State, as construed by her highest Court

in the decision complained of, are in full compliance with Section 391.

In ruling that the 1978 Act does not violate Section 391, the essential point made by the West Virginia Supreme Court of Appeals is that Code 11-13-2, Code 11-13-2d, and Code 11-13-2m are all measures on or with respect to the generation or transmission of electric power in the State. The New Mexico Electrical Energy Tax Act was limited to the single act of generating electricity to be sold outside the State. West Virginia's 1978 Act, on the other hand, reaches beyond the single act of producing electricity to the sharing of the tax burden on or with respect to the generation or transmission of electric power in this State between our citizens and out-of-State consumers. As this State's High Court

indicated, the 1978 Act embraces the entire process. Accordingly, any comparison between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act discloses the salient fact that, under the New Mexico statute, the tax on or with respect to the generation or transmission of electric power was borne exclusively by out-of-State consumers, while under the 1978 Act, taxation is shared between domestic and out-of-State consumers, the greater part of which burden is borne by West Virginians.

Since West Virginia's 1978 Act and the New Mexico Electrical Energy Tax Act condemned in Snead clearly are not comparable statutes, and the tax burden occasioned on or with respect to the generation or transmission of electricity in West Virginia being greater on

domestic consumers than on out-of-State users of such electricity, no basis exists for invalidating the 1978 Act either under Section 391, as interpreted by this Court in Snead, or under the Snead opinion itself.

The foregoing reasoning applies to the claims advanced by the Petitioners that the 1978 Act is discriminatory under the Commerce Clause. Further, the decision of this Court in Armco Inc. v. Hardesty, ___ U.S. ___, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984), does not aid Petitioners' claim of Commerce Clause discrimination for the reason that each of the Petitioners is an in-State manufacturer of electric power subjected to the same tax burden measured precisely according to the business activities which each conducts within West Virginia.

Another important reason to deny certiorari review is the lack of finality of the opinion below. The opinion did not decide Petitioners' constitutional challenge to the tax, but remanded the litigation to the trial court to allow it to determine whether the tax violates the Commerce and Equal Protection Clauses of the United States Constitution. The continued pendency of substantial and potentially dispositive federal questions in the lower courts precludes review at this time under traditional or expanded concepts of finality. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). In fact, the instant Petition (at page 8) assures this Court that, should it decline review at this time, both the resolved statutory question and the unresolved

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constitutional questions, will be presented again at the conclusion of the State litigation. Denying review at this time will thus prevent piecemeal litigation without prejudicing Petitioners' right to seek review at a later date.

ARGUMENT

1. THE FEDERAL STATUTE

The federal statute involved, Title 15 U.S.C. § 391, forbids the imposition of a state tax on or with respect to the generation or transmission of electric power which results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

2. NEITHER THE 1978 ACT NOR ITS APPLICATION BY THE WEST VIRGINIA SUPREME COURT OF APPEALS IS VIOLATIVE OF TITLE 15 U.S.C. § 391.

The Petitioners allege that the West Virginia Legislature, in the 1978 Act, has frustrated congressional policy expressed in Section 391 by imposing a greater tax burden on electricity generated and transmitted in interstate commerce than is imposed on electricity which is generated and transmitted in intrastate commerce, which frustration has been augmented by the majority and concurring opinions issued by the West Virginia Supreme Court of Appeals. These opinions comprise the Appendix to Respondents' Brief, Part A being the majority opinion, pp. a1 through a23, inclusive, and Part B being the concurring opinion, pp. a24 through a37, inclusive.

The linchpin of Petitioners' case in the Court below and before this Court is their insistence that the only portion of the 1978 Act having any connection with the imposition of a tax on or with respect to the generation or transmission of electric power is Code 11-13-2m. They strain to uphold this position in order to bring the case within the ambit of Arizona Public Service Company v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

In Snead, this Court struck down, as violative of Section 391, the State of New Mexico's Electrical Energy Tax Act, Chapter 263, Laws 1975, Sections 72-34-1 to 72-34-6 NM Stat. Ann. 1953 (repealed). This statute imposed a 2 percent tax on any person generating electricity within the state on each

kilowatt hour produced, whether the sale took place within or without New Mexico, but provided for a credit on the amount of Electrical Energy Tax against the state's separate gross receipts tax of 4 percent due from the generating company upon the retail sale of such electricity within the state. The result was that when all or most of a generating company's product was sold in New Mexico, it incurred no Electrical Energy Tax because of the credit on the separate gross receipts tax on sales, while a generating company selling all of its electric power in other states and consequently incurring no gross receipts tax liability in New Mexico was burdened with the Electrical Energy Tax.

The Snead Court rejected New Mexico's argument that the determination

of the question of whether the Electrical Energy Tax Act imposed a greater burden on generated electricity sent out of New Mexico than was consumed in-state required an examination of the state's total tax structure on the ground that Section 391 "is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State" and that to "look narrowly to the type of tax the federal statute names" rather than to the entire state tax structure "is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." 60 L. Ed. 2d 113.

Because they have fashioned their case upon this language, Petitioners are compelled to argue that the only portion

of the 1978 Act which pertains to the generation or transmission of electric power in West Virginia is Code 11-13-2m.

However, unlike New Mexico, West Virginia has not confined the taxation of the electric power business to a single statute embodied in Code 11-13-2m. In ruling that the 1978 Act does not violate Section 391, the essential point made by the West Virginia Supreme Court of Appeals is that Code 11-13-2; Code 11-13-2d, and Code 11-13-2m are all measures on or with respect to the generation or transmission of electric power. See Appendix, Part A, pp. a18-a19:

> "Moreover, we cannot ignore the fact that the 1978 amendments did more than enact Section 2m. As we have previously stated, several sections of the business and occupation tax which dealt with the manufacturing of electricity were amended. Under well known canons of

statutory construction, we are obliged to consider a legislative enactment in its entirety. [Citations omitted]

"If we consider the 1978 amendments in their entirety, it is apparent that the legislature did not single out and tax only the manufacturing of electricity that is transmitted out of state. Under Section 2d, the manufacturing of electricity that is used in this State is also taxed at the same rate."

and at p. a20:

"In the present case, the 1978 amendments embody both Sections 2d and 2m. It is clear that both sections tax the business of generating electric power at the same rates. It is also clear that Section 2d deals with in-state generation and sale while Section 2m relates only to in-state generation or manufacture which is transmitted out of state. We find no discrimination between Sections 2d and 2m."

Referring to the Electrical Energy Tax Act under consideration in Snead, the West Virginia Court observed that

New Mexico had enacted a single tax statute directed at manufacturing electricity transmitted out of state, which statute Congress declared to be discriminatory. Appendix, Part A, pp. a5, a7, a19, a20. In contrast to the New Mexico statute, Code 11-13-2m was enacted in 1978 as part of a larger plan to reorganize the Business and Occupation Tax on utilities. Appendix, Part A, pp. a8, a9.

Of paramount importance in any comparison between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act is the mechanism of Code 11-13-2 which limits the measure of the tax prescribed by Code 11-13-2m on electricity generated in West Virginia and transmitted to other states to its value immediately before transportation. Domestic

consumers of West Virginia-generated electric power, on the other hand, must bear the much larger tax burden of gross receipts of sale by way of Code 11-13-2d, which measure includes all costs of generation and delivery of the product in this State. Appendix, Part A, n.9, p. a16.

As explained in the concurring opinion, the difference between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act:

> "relates to the fact that West Virginia producers and distributors of electricity are not exempt from the burden of W. Va. Code, 11-13-2m [1978] but, rather, are subjected to exactly the same burden plus the additional tax on transmission and distribution provided in W. Va. Code, 11-13-2d [1978]." (Emphasis supplied) See Appendix, Part B, pp. a36, a37.

Accordingly, any comparison between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act discloses the salient fact that under the New Mexico statute the tax on or with respect to the generation or transmission of electric power was borne exclusively by out-of-State consumers while, under the 1978 Act, taxation is shared between domestic and out-of-State consumers, the greater part of which burden is borne by West Virginians.

Petitioners argue, in substance, that under Snead the West Virginia Court cannot take into consideration that portions of the 1978 Act other than Code 11-13-2m are taxes on or with respect to the generation or transmission of electric power within the meaning of Section 391.

Petitioners' view of the Snead opinion is contrary to the settled decisions of this Court. See, Henniford v. Silas Mason Co., 300 U.S. 577, 81 L. Ed. 814, 37 S. Ct. 524 (1937) at 81 L. Ed. 819:

> "'There is no demand in . . . [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.'"

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472, 76 L. Ed. 1232, 52 S. Ct. 631 (1932) at 76 L. Ed. 1238:

> "When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves."

The West Virginia Court has traditionally considered the various provisions of the State's Business and Occupation Tax in pari materia.

Appendix, Part A, p. a18. In characterizing Code 11-13-2m as part of a larger plan to reorganize the Business and Occupation Tax on utilities, and in the further characterization of Code 11-13-2, Code 11-13-2d, and Code 11-13-2m as tax measures on or with respect to the generation or transmission of electric power in this State, West Virginia's High Court was following its settled construction of the Business and Occupation Tax statute.

Petitioners maintain that Code 11-13-2d, because it encompasses both the generation and sale of electric power within the State, is not a statute on or with respect to the generation or transmission of electricity within the meaning of Section 391; that the only West Virginia statute on or with respect to

the generation or transmission of electric power is Code 11-13-2m. In this connection, it is again pointed out that Code 11-13-2m encompasses both the generation and sale of electric power in West Virginia when such sale, made by the producer, is not subject to taxation under Code 11-13-2d. From Petitioners' erroneous premise flows their next contention that Code 11-13-2d and Code 11-13-2m do not include equivalent events and therefore do not impose equivalent tax burdens on domestic and out-of-State users of electricity produced in this State. Thus Petitioners argue that the West Virginia Supreme Court of Appeals, in rendering the decision below, considered the entire tax structure of the State, contrary to Snead and adjudged the taxes prescribed by Code 11-13-2d

and Code 11-13-2m to be equivalent burdens.

Respondents submit that, Petitioners' arguments notwithstanding, the West Virginia Supreme Court of Appeals was concerned with the policy of Congress expressed in Section 391, forbidding state taxes on or with respect to the generation or transmission of electricity which impose a greater burden on interstate commerce than on intrastate commerce. Manifestly, the congressional purpose was directed at equivalent tax burdens, not equivalent tax events. The majority and concurring opinions of the State Court clearly demonstrate that the construction of the 1978 Act, with reference to Code 11-13-2, Code 11-13-2d, and Code 11-13-2m did not involve West Virginia's entire tax structure. The

Business and Occupation Tax is only one part of the State's tax structure, albeit an extremely important one.

Moreover, the West Virginia Court most emphatically did not hold that Code 11-13-2d and Code 11-13-2m prescribe equivalent tax burdens. The ruling of the Court was that Code 11-13-2, Code 11-13-2d, and Code 11-13-2m are all tax measures on or with respect to the generation or transmission of electric power and that the differentiation prescribed by Code 11-13-2 of the measure of the respective taxes to be paid by in-State and out-of-State consumers of West Virginia-generated electric power means that, in terms of Section 391, the greater economic burden of the tax prescribed by the 1978 Act is borne by West

Virginia consumers than by out-of-State consumers.

Petitioners have bound themselves to the theory that Code 11-13-2m is the only West Virginia statute on or with respect to the generation or transmission of electric power and, as such, must be isolated from the rest of the 1978 Act. When this separation is accomplished, Petitioners maintain, Code 11-13-2m is akin to the New Mexico Electrical Energy Tax Act. In their attack on the decision of the West Virginia High Court they ask that this Court adopt their theory.

The 1978 Act of West Virginia and the New Mexico Electrical Energy Tax Act are not, however, comparable statutes. The Respondents submit that the 1978 Act, being particularly advantageous to

interstate commerce over intrastate commerce, comports fully with the congressional design expressed in Section 391, and any resemblance between any portion of the 1978 Act and the New Mexico statute interdicted by Congress and by this Court in Snead is purely superficial.

3. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS AND ARIZONA PUBLIC SERVICE COMPANY v. SNEAD, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

Petitioners accuse the West Virginia High Court of deciding the case at bar in direct conflict with Arizona Public Service Company v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979). In support of this thesis, Petitioners argue that there is no material difference between the credit mechanism of the New Mexico Electrical Energy Tax Act

struck down in Snead and the exclusion from the measure of the tax prescribed by Code 11-13-2m of electricity subject to taxation under Code 11-13-2d. (Petition, pp. 12, 13.)

However, this Court in Snead recognized that West Virginia has not adopted the interdicted taxing scheme of New Mexico. See, 60 L. Ed. 2d 113, n.7:

> "The amici in this case have pointed to several similar state taxes on the generation of electricity. Pa Stat Ann, Tit 72, § 8101 (Purdon Supp 1978-1979); Wash Rev Code §§ 82.16.020, 82.16.050 (1976); W Va Code §§ 11-13-2d, 11-13-2m (Supp 1978). None of these States, however, has adopted precisely the scheme used by New Mexico, and we express no opinion as to the validity of these or any other state tax laws." (Emphasis supplied) See Appendix, Part A, p. a8.

The Snead Court further recognized that Section 391 was aimed directly at

the New Mexico Electrical Energy Tax Act. 60 L. Ed. 2d 112. Section 391 is not intended to prohibit, restrain or burden any other State which currently imposes a nondiscriminatory tax on the generation of electricity. U.S. Code Cong. & Ad. News, 3865 at 3866, 94th Cong., 2d Sess. [1976].

Petitioners further maintain that the West Virginia system of taxing the electricity business does not impose an evenhanded tax on in-State and out-of-State consumers of electric power produced in the State as required by Section 391 and by Snead. (Petition, p. 14.)

The evenhandedness contemplated in Section 391 is described in Snead, 60 L. Ed. 2d 114:

> "Congress required only that New Mexico, if it chooses to tax the generation of electricity for consumption in

> either city [Phoenix or Albuquerque], tax it equally for each." (Bracketed material and emphasis supplied)

Respondents submit that Code 11-13-2m, although it does not include within its measure electricity generated in this State which is subject to tax under Code 11-13-2d, is, nevertheless, an example of the evenhanded tax contemplated by Congress in Section 391 and by this Court in Snead. For the reason that the measure of the tax prescribed to be paid by domestic consumers of electricity generated in this State (4 percent of gross receipts of sales, Code 11-13-2d) is so much larger than the measure of the tax prescribed to be paid on electricity generated in West Virginia which is transmitted outside the State (4 percent of the value in West Virginia, Code 11-13-2; Code 11-13-2m) consumers in

Charleston, West Virginia, pay much more of taxes prescribed by the 1978 Act upon West Virginia-generated electricity than do consumers in Richmond, Virginia. This difference in the measure of the tax in terms of Section 391 and under the decision of this Court in Snead means that the tax burden on West Virginia domestic consumers of West Virginia-generated electric power is greater than the tax burden on out-of-State consumers of electricity produced in this State.

New Mexico's Electrical Energy Tax Act was limited to the single act of generating electricity. West Virginia's 1978 Act reaches beyond the single act of production to the sharing of the tax burden on or with respect to the generation or transmission of electric power in this State between our citizens and

out-of-State consumers. As the State's High Court ruled, the 1978 Act embraces the entire process. Thus, contrary to Petitioners' allegations, in arriving at a decision in the case at bar, it was unnecessary that the West Virginia Court consider the State's entire tax structure, and a fair reading of the majority and concurring opinions will establish that the Court's attention was focused entirely on the relevant statute, the 1978 Act.

Furthermore, this Court is not asked to consider the State's entire tax structure. It is quite clear that an examination of the 1978 Act will reveal to this Court, as it did to the West Virginia Supreme Court of Appeals, that the 1978 Act squarely meets the test prescribed by Section 391, viz: It has

not resulted, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

4. THERE IS NO CONFLICT BETWEEN THE 1978 ACT AS CONSTRUED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS AND ARTICLE I, SECTION 8, CL. 3 (THE COMMERCE CLAUSE) OF THE CONSTITUTION OF THE UNITED STATES.

Petitioners maintain that Code 11-13-2, Code 11-13-2d, and Code 11-13-2m, the sections of the 1978 Act ruled by the West Virginia Supreme Court of Appeals to be on or with respect to the generation or transmission of electric power in this State, discriminate against interstate commerce in favor of intrastate commerce in violation of the Commerce Clause of the United States Constitution. (Petition, pp. 16, 17.)

In support of this allegation, Petitioners invoke the identical arguments which they advanced in their claim that the 1978 Act, as construed by the Court below, violates Section 391. Respondents submit that these contentions have been adequately disposed of in the preceding parts of this Brief and will not be belabored here.

Petitioners add the further argument that the rulings of the West Virginia High Court are irreconcilable with the decision of this Court in Armco Inc. v. Hardesty, ___ U.S. ___, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). (Petition, pp. 14, 15.)

Respondents submit that Armco is not apposite to the case at bar. The West Virginia statute involved in Armco was Code 11-13-2c, a section of the

Business and Occupation Tax statute prescribing the rate of tax to be paid on wholesale sales made within the State. Through the mechanism of Code 11-13-2, persons engaged in the manufacturing business within the State were relieved of the tax upon the local sale of their manufactured products which out-of-State manufacturers making wholesale sales in West Virginia of their products manufactured in other states, were required to pay. This Court pronounced the statutory exemption of local sales by in-State manufacturers discriminatory against out-of-State manufacturers making wholesale sales within this State in violation of the Commerce Clause.

The Armco decision does not apply to the facts of the case at bar for the reason that each of the Petitioners is

an in-State manufacturer of electric power subjected to the same tax burden measured precisely according to the business activities which each Petitioner conducts within West Virginia. See Appendix, Part B, pp. a30-a31:

> "Accordingly, West Virginia's business and occupation tax passes constitutional muster. The entire process of providing electricity to the ultimate consumer is taxed. If the whole process goes on in West Virginia, then West Virginia taxes manufacture, transmission and distribution. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture. Thus the tax is fairly apportioned and violates neither the Constitution of the United States or [sic] 15 USC § 391 (1976)." (Emphasis in original)

Respondents submit that the absence of discrimination in the tax treatment accorded manufacturers of electric power

in West Virginia by the 1978 Act assures full compliance with Commerce Clause strictures, hence Petitioners' reliance on the Armco decision is misplaced.

5. THE DECISION BELOW IS NOT RIPE FOR REVIEW BECAUSE IT IS NOT A FINAL JUDGMENT.

The trial court below agreed with Petitioners' claim that W. Va. Code 11-13-2m violated 15 U.S.C. § 391, and therefor did not address their additional claims that the State tax violated the Commerce and Equal Protection Clauses of the United States Constitution. When the West Virginia Supreme Court of Appeals reversed the trial court, it, too, failed to address the constitutional challenge, but remanded it back to the trial court, where it is now pending. While it is unnecessary to

predict whether the unresolved constitutional questions will eventually be presented to this Court, it is clear that granting the present petition for certiorari will require piecemeal litigation of Petitioners' various theories, any of which could be outcome-determinative.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(c), which provides for review of "final judgments or decrees" only. The opinion below does not satisfy traditional definitions of finality. It does not "terminate the litigation," as required by Mower v. Fletcher, 114 U.S. 127, 128, 29 L. Ed. 117, 5 S. Ct. 799 (1885). "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review." Collins

v. Miller, 252 U.S. 364, 371, 64 L. Ed. 616, 40 S. Ct. 37 (1920).

Most importantly, the decision below expressly leaves potentially dispositive federal questions for continued litigation. This Court has held that the mere potential that additional federal questions may arise subsequent to a state court's remand, precludes certiorari review:

> "This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here." Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 72, 92 L. Ed. 1212, 68 S. Ct. 972 (1948).

In their Petition at pp. 8-9, Petitioners attempt to fit the opinion below into one of the expanded concepts of

finality expounded in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Petitioners fail to mention that the threshold requirement of Cox, that no substantial federal questions remain unresolved, is unmet in this case. In Cox, this Court identified four categories of cases which would be considered final in spite of unresolved proceedings still pending:

> "In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' [citation omitted], as well as precipitate interference with state litigation. * * *" 420 U.S. at 477-478.

The instant Petition, at page 8, assures this Court that it will have a later opportunity to address the issues for which review is presently sought. That will insure that Petitioners get their "day in court." Nothing in the policies of finality embodied in Cox or its predecessors allows Petitioners two days in court. To so allow would unnecessarily congest this Court's docket, needlessly interfere with orderly State proceedings, and, should Respondents prevail, delay the ultimate resolution of the controversy below.

CONCLUSION

The Respondents respectfully submit that, for the foregoing reasons, the decision of the West Virginia Supreme Court of Appeals is, in all respects, manifestly correct, and the relief to

which they are entitled is that the Petition for a Writ of Certiorari to said Court be denied.

Respectfully submitted,

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APPENDIX

Chief Justice McHugh and Justice McGraw concur and reserve the right to file concurring opinions.

Justice Neely dissents and reserves the right to file a dissenting opinion.

NO. 16067

DUQUESNE LIGHT CO., ET AL.

V.

STATE TAX DEPT., ETC., ET AL.

Kanawha County

Reversed and Remanded

Miller, Justice

1. Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of Arizona Public Serv. Co. v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

2. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, Sands v. Sec. Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958).

Miller, Justice:

The State Tax Commissioner appeals a decision of the Circuit Court of Kanawha County which struck down our business and occupation tax on the generation of electric power, W. Va. Code, 11-13-2m.[1] The court below held that this case was controlled by Arizona Public Serv. Co. v. Snead, 441 U.S. 141,

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[1]The appellees are Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company, and Virginia Electric and Power Company.

60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979), in which the United States Supreme Court struck down a New Mexico utility tax because it violated Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1976). We disagree and reverse.

I.

Before addressing the particular facts and issues raised in this case, it is important to understand the Snead case. The United States Supreme Court in Snead decided the case based upon 15 U.S.C. § 391,[2] which had been enacted

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[2] 15 U.S.C. § 391 provides:

"No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results,

because of a discriminatory tax adopted by the State of New Mexico. The purpose of 15 U.S.C. § 391 was set out in the Senate Finance Committee Report, which the United States Supreme Court quoted:

> "'The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries.'" 441 U.S. at 147, 60 L. Ed. 2d at 111, 99 S. Ct. at 1632-33.

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either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

As the United States Supreme Court noted, the name of the state was not disclosed in the Committee Report, but during the floor debate, "Senators Domenici and Montoya of New Mexico, Senators Fannin and Goldwater of Arizona and Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax." 441 U.S. at 147, 60 L. Ed. 2d at 112, 99 S. Ct. at 1633. Thus, the Supreme Court had before it a legislative enactment directed at a state statute that Congress had declared to be discriminatory.

A critical part of the Court's opinion was its determination that it would not adopt the Commerce Clause Test for determining whether the state tax was discriminatory under 15 U.S.C.

§ 391. New Mexico urged this test since it "requires examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of state. See Halliburton Oil Well Cementing Co. v. Reily, 373 US 64, 69." 441 U.S. at 149, 60 L. Ed. 2d at 113, 99 S. Ct. at 1633-34. New Mexico's central argument was that if the Court would examine the state's entire utility tax, it would be clear that the tax on utilities shipping energy out of state was not discriminatory.[3] However, the Court declined to

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[3]The United States Supreme Court summarized New Mexico's argument as follows:

"Power sold within New Mexico, they argue, is subject to a 4% tax: 2% from the electrical energy tax and 2% from the gross receipts tax. By contrast, New Mexico subjects electricity sent out

tax on utilities.[4] Prior to 1978, electric utilities generating or selling electricity in this State were taxed under W. Va. Code, 11-13-2d, at the rate of 5.72 percent based on sales and demand charges for domestic purposes and 4.29 percent on sales and demand charges for all other purposes.[5] Electric utilities generating electricity in this State but transmitting it out of state were taxed under the general manufacturing tax rate under W. Va. Code, 11-13-2b, which was 0.88 percent. See Virginia

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[4] See 1978 W. Va. Acts, Ch. 96.

[5] W. Va. Code, 11-13-2d, excepted "income received by municipally owned plants producing or purchasing electricity and distributing same." This exception for municipally owned electric utilities was continued in the 1978 amendments. W. Va. Code, 11-13-2d (1978).

Elec. and Power Co. v. Haden, 157 W. Va. 298, 200 S.E.2d 848 (1973), cert. denied, 416 U.S. 916, 40 L. Ed. 2d 118, 94 S. Ct. 1624 (1974).

As applicable to this case, the material changes made by the 1978 amendments to W. Va. Code, 11-13-1, et seq., were as follows: first, the taxation on manufacturing of electricity was removed from W. Va. Code, 11-13-2b, and placed in a new section, W. Va. Code, 11-13-2m. This section provides that the tax rate would be 4 percent, subject to a provision that the rate would be 2.46 percent on electricity sold to a customer engaged in manufacturing if the contract demand exceeded 200,000 kilowatts per hour per year, or

if the usage exceeded 200,000 kilowatts per hour in a year.[6]

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[6]W. Va. Code, 11-13-2m, provides:

"(1) Upon every person engaging or continuing within this State in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

"(2) The measure of this tax shall be the value of all electric power generated or produced in this State for

The 1978 amendments also altered W. Va. Code, 11-13-2d, to provide that electric utilities generating electricity for sale in this State would be taxed at a 4 percent rate, and those which do not generate electricity but supply it are to be taxed at a 3 percent rate. A proviso similar to the one in Section 2m was placed in this section to provide for a reduced rate of 2.46 percent if a manufacturing customer's contract demand exceeded 200,000 kilowatts per hour per

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sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article."

year or if the usage exceeded 200,000 kilowatts per hour per year.[7]

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[7]The relevant portion of W. Va. Code, 11-13-2d, states:

"Upon any person engaging or continuing within this State in any public service or utility business . . . there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: . . . electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes . . . : Provided, that electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes . . . : Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a

It is quite clear that the 1978 amendments harmonized the tax rate between the generation and sale in this State of electric power and the generation of electric power in this State for transmission out of state. It is true that there is some difference in language between Sections 2d and 2m with regard to measuring the value of the

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manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year . . . . The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

product, i.e., electric power.[8] However, W. Va. Code, 11-13-2, was also amended in 1978 to bring equality to the measurement of the value between Sections 2d and 2m taxes:

> "If any person liable for any tax under sections two-a, two-l or two-m [§§ 11-13-2a, 11-13-2l or 11-13-2m] shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in said section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and

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[8] W. Va. Code, 11-13-2d, uses the term "gross income" from "sales and demand charges"; and W. Va. Code, 11-13-2m, uses the term "gross proceeds derived from the sale thereof."

uniform rules for ascertaining such value."[9]

III.

With this background in mind, we address the issue in this case: does W. Va. Code, 11-13-2m, violate 15 U.S.C. § 391? The circuit court did not elaborate on its holding. The principal

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[9]The parties agree that the State Tax Commissioner has by a written memorandum with the appellees adopted a uniform formula for ascertaining the value of electricity under Section 2m, which is known as the VEPCO formula. Under this formula, value is essentially the cost of generation at the place of manufacture plus an allowed rate of return. (Appellees' brief, p. 6-7) The Tax Commissioner argues, and we agree, that with the tax rates being the same, this valuation or measurement yields a lower tax on electric power transmitted out of state, because the measurement of value for electricity generated and sold in this State includes not only the cost of manufacturing and a reasonable rate of return, but the cost of transporting it to the customer (poles, lines, transformers, etc.) as well.

argument advanced by the utilities is that Section 2m must be read in isolation. When it is, it is patently discriminatory under Snead because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d.

We are cited several cases in which we have held that our business and occupation tax is composed of a number of separate taxes which are applicable to various distinct business activities. E.g., Virginia Elec. and Power Co. v. Haden, supra; United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, appeal dismissed sub nom. United Fuel Gas Co. v. Haden, 396 U.S. 116, 24 L. Ed. 2d 309, 90 S. Ct. 398 (1969); Owens-Illinois Glass Co. v. Battle, 151

W. Va. 655, 154 S.E.2d 854 (1967). Based upon these cases, the argument is made that each section of the business and occupation tax must stand scrutiny separately.

We have not, however, adopted such a rigid view of our business and occupation tax structure. For example, in Owens-Illinois Glass Co. v. Battle, we utilized the doctrine of in pari materia to settle a question under our business and occupation tax by construing several related provisions.

Moreover, we cannot ignore the fact that the 1978 amendments did more than enact Section 2m. As we have previously stated, several sections of the business and occupation tax which dealt with the manufacturing of electricity were amended. Under well known canons of

statutory construction, we are obliged to consider a legislative enactment in its entirety. Woodring v. Whyte, ___ W. Va. ___, 242 S.E.2d 238 (1978); Spencer v. Yearce, 155 W. Va. 54, 180 S.E.2d 868 (1971); Syllabus Point 1, State ex rel. Holbert v. Robinson, 134 W. Va. 524, 59 S.E.2d 884 (1950).

If we consider the 1978 amendments in their entirety, it is apparent that the legislature did not single out and tax only the manufacturing of electricity that is transmitted out of state. Under Section 2d, the manufacturing of electricity that is used in this State is also taxed at the same rate.

Our situation is entirely different from what existed in Snead where New Mexico had enacted a single tax statute directed at manufacturing electricity

which was transmitted out of state. As noted in our analysis of the Snead decision, the Court refused to go beyond the confines of the statute to determine from the total framework of New Mexico's tax scheme if the particular tax was in fact discriminatory.

In the present case, the 1978 amendments embody both Sections 2d and 2m. It is clear that both sections tax the business of generating electric power at the same rates. It is also clear that Section 2d deals with in-state generation and sale while Section 2m relates only to in-state generation or manufacture which is transmitted out of state. We find no discrimination between Sections 2d and 2m.

The fundamental fallacy of the appellees' argument is that they would

have us limit our analysis to Section 2m, as if the legislative amendments in 1978 involved only this section.[10] We cannot, however, ignore the other sections contained in the 1978 amendments dealing with the manufacture of electrical power.[11]

Consequently, we hold that Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of Arizona Public Serv. Co. v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106,

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[10]This was also the mistake in the student analysis on which the trial court relied in part. See Note, West Virginia's Generation of Electricity Tax: Is It Valid After Snead?, 83 W. Va. L. Rev. 79 (1981).

[11]See, i.e., W. Va. Code, 11-13-2, -2b, -2d and -2m.

99 S. Ct. 1629 (1979), and the Circuit Court of Kanawha County erred in holding that it did.

IV.

Although both parties have briefed the question of whether the statute violates the Commerce and Equal Protection Clauses of the United States Constitution, as well as the Equal and Uniform Taxation Provision of the West Virginia Constitution, we decline to address these issues because they were not passed upon by the circuit court. We have traditionally held, as indicated in Syllabus Point 2 of Sands v. Sec. Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958), that:

> "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."

See also West Virginia Dept. of Highways v. Delta Concrete Co., ___ W. Va. ___, 268 S.E.2d 124 (1980); Dixon v. American Indus. Leasing Co., 157 W. Va. 735, 205 S.E.2d 4 (1974); Syllabus Point 1, Pettry v. Chesapeake and Ohio Ry. Co., 148 W. Va. 443, 135 S.E.2d 729 (1964).

Because we have found the circuit court in error in its application of Snead, we reverse the judgment and remand the case in order that it may consider the other grounds asserted by the appellees in their complaint.

Reversed and Remanded.

NO. 16067 - DUQUESNE LIGHT CO., ET AL V. STATE TAX DEPT., ETC., ET AL.

Neely, Justice, concurring:[1]

I concur to mention some additional distinctions between our business and occupation tax structure and the electrical energy tax that was held invalid in Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979). Under the taxing scheme enacted by the State of New Mexico, a producer of electricity in New

[1]Originally I noted a possible dissent in this case because it appeared that the West Virginia situation was controlled by Arizona Public Service v. Snead, infra. But as I methodically worked through the New Mexico and West Virginia tax schemes, my dissent became a concurrence. I now agree with the majority's opinion and add this concurrence only to explain my own reasoning in the hope that I might save work for others.

Mexico who sold the electricity out-of-state paid a 2 percent tax that would not have been collected if the electricity had been sold in New Mexico. In effect, then, New Mexico taxes separately the production of electric power for export.

Under New Mexico law distributors of electrical energy were liable to payment of a gross receipts tax of 4 percent.[2] This tax, enacted in 1953, was not related to electricity generation; the utility would have paid the same 4 percent if it had been a door-to-door distributor of bubble gum.[3]

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[2]NMSA 7-9-1 to 7-9-81 [1978] sets out New Mexico's general excise tax.

[3]The tax imposed on the New Mexico electric utilities was a general excise tax that applied in equal measure to all other businesses within the State. That

When the New Mexico electrical energy tax[4] was imposed, the statute gave credit for the electrical energy tax against the New Mexico gross receipts tax--a credit that could be used only by in-state, New Mexico producers/distributors. Thus, although New Mexico was entitled to tax the production of electrical energy, it failed to tax both the domestic and foreign producers equally because New Mexico, in effect, refunded the tax to domestic producers

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section, NMSA 7-9-4 [1983], in its present incarnation reads: "A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico. B. The tax imposed by this section shall be referred to as the 'gross receipts tax.'"

[4]NMSA 7-18-1 to 7-18-6 [1978]. New Mexico's electrical energy tax, repealed in 1982, related to the imposition and

through a tax credit that applied to an entirely unrelated tax. That is the difference between pre-Snead New Mexico and today's West Virginia. What if New Mexico had given compensating credits against domestic producers' turnpike tolls or had given them a credit toward the New Mexico vehicle licenses of power company trucks? These examples make clear that the electrical energy tax and its compensating credit for in-state producers explicitedly [sic] discriminated against interstate commerce.

West Virginia does not refund the electricity generation tax to domestic producers; West Virginia taxes domestic

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rate of tax on the generation of electricity and required reports or remittances of persons subject to the tax.

producers more heavily because they do more in West Virginia. But at first blush West Virginia's scheme appears similar to New Mexico's scheme because we have one subsection of the West Virginia Code that applies to foreign producers and another that applies to domestic producers. Our tax for both domestic and foreign producers, however, is calculated on exactly the same basis, namely on the value of electricity manufactured, transmitted, and distributed.

The structure of W. Va. Code, 11-13-2d [1978] and 11-13-2m [1978] discloses that West Virginia taxes all the electrical utilities equally along a continuum that starts with manufacture of the power and ends with its delivery to the consumer. New Mexico's tax was

levied only upon electricity manufactured; the credit, however, was against gross domestic sales. In evaluating the applicability of Snead, supra, to the West Virginia business and occupation tax it is important to point out that the New Mexico tax gave credit for one type of tax--an electrical energy tax--against another type of tax, namely a sales tax.

In state statutes that affect interstate commerce, words of art or characterizations can be more significant than in almost any other area of law. Phrases such as "privilege of doing business" or "general excise" can made or break a state statute. The Supreme Court has held that such "magic words or labels" cannot validate an otherwise invalid tax, but may be

capable of disabling "an otherwise constitutional levy." Railway Express Agency v. Virginia, 358 U.S. 434, at 441 (1959).

Under the Supreme Court's recent view of state taxation of interstate commerce, a state tax on the "privilege of doing business" is not per se unconstitutional in the absence of a claim "that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayers, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, at 287 (1977), reh. den. 430 U.S. 976 (1977). Accordingly, West Virginia's business and occupation tax passes constitutional

muster. The entire process of providing electricity to the ultimate consumer is taxed. If the whole process goes on in West Virginia, then West Virginia taxes manufacture, transmission, and distribution. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture. Thus the tax is fairly apportioned and violates neither the Constitution of the United States or 15 U.S.C. § 391 (1976).

In order to understand the legality, under Snead, supra, of West Virginia's business and occupation tax structure as applied to out-of-state utilities one must look for a moment at the nature of the electric utility business. Approximately 90.8 percent of the value of electrical energy at the point of consumption is attributable to the cost

of manufacture. For example, if we study the 1983 Annual Report of the Appalachian Power Company we find that its production of power (manufacture) expenses were $495,741,691 while its bulk transmission costs were only $15,981,809 and its cost of low voltage distribution to consumers was only $41,147,842. Consequently, the biggest overall activity in the electric utility business is manufacture.

The only reason that West Virginia taxes generation of power for out-of-state consumption under W. Va. Code, 11-13-2m [1978] and generation for in-state consumption under W. Va. Code, 11-13-2d [1978] is so that out-of-state producers will not pay tax on the value of transmission and distribution activities. The tax for in-state consumption

is higher than the tax on out-of-state consumption because West Virginia also taxes transmission and distribution for in-state producers. Under the West Virginia business and occupation tax statutes everything that an electric utility does in the State of West Virginia--whether a foreign or domestic producer--is taxed at 4 percent. Manufacturers of electrical energy for sale inside West Virginia are treated exactly as manufacturers of electrical energy for sale outside of West Virginia.

For our purposes here it is important to point out that West Virginia makes no effort to exempt in-state producers and distributors from the burden of the tax on electrical energy production. This lack of discrimination is made possible because West Virginia

has always had a business and occupation tax on the public utility business. New Mexico ran afoul of 15 U.S.C. § 391 (1976) because, for all intents and purposes, New Mexico taxed out-of-state producers on the basis of generation and in-state producers on the basis of gross receipts (sales). Since New Mexico relied upon a gross receipts (sales) tax to raise revenue from producers of electricity in New Mexico it had no choice but to enact a subsequent special electrical energy tax to capture revenue from utilities generating power in New Mexico to be sold outside of New Mexico. Without New Mexico's 2 percent tax credit against the gross receipts tax, New Mexico consumers would have had their rates increased by 2 percent.

What New Mexico did was entirely logical, but also probably unconstitutional; at least we know that it was against the subsequently enacted 15 U.S.C. § 391 (1976). In New Mexico's case the substance of the tax was reasonable but the form was unconstitutional. The Supreme Court's overruling of Specter Motor Service v. O'Connor, 340 U.S. 602 (1951) in Complete Auto Transit Inc. v. Brady, supra, implies that triumphs of form over substance are no longer fashionable in determining whether a tax is a burden on interstate commerce. At some point, however, form becomes substance: it is a fine line, but is was crossed by New Mexico. Under Complete Auto, supra, West Virginia is on the constitutional side of the line

as well as being within 15 U.S.C. § 391 (1976).

It may appear initially that the distinction between New Mexico's 2 percent credit for the electrical energy tax against the New Mexico gross receipts tax *versus* West Virginia's exemption from the operation of *W. Va. Code*, 11-13-2m [1978] for local utilities paying tax under *W. Va. Code*, 11-13-2d [1978] is a distinction without a difference. But nothing could be father [*sic*] from the truth: there is a difference and that difference relates to the fact that West Virginia producers and distributors of electricity are not exempt from the burden of *W. Va. Code*, 11-13-2m [1978] but, rather, are subjected to exactly the same burden plus the *additional* tax on transmission and

distribution provided in W. Va. Code, 11-13-2d [1978]. If, indeed, we had imposed a special tax on the generation of electric power and then given West Virginia producers/distributors of power a credit against an entirely unrelated sales tax we would be within the purview of Arizona Public Service Co. v. Snead, supra. But we didn't!